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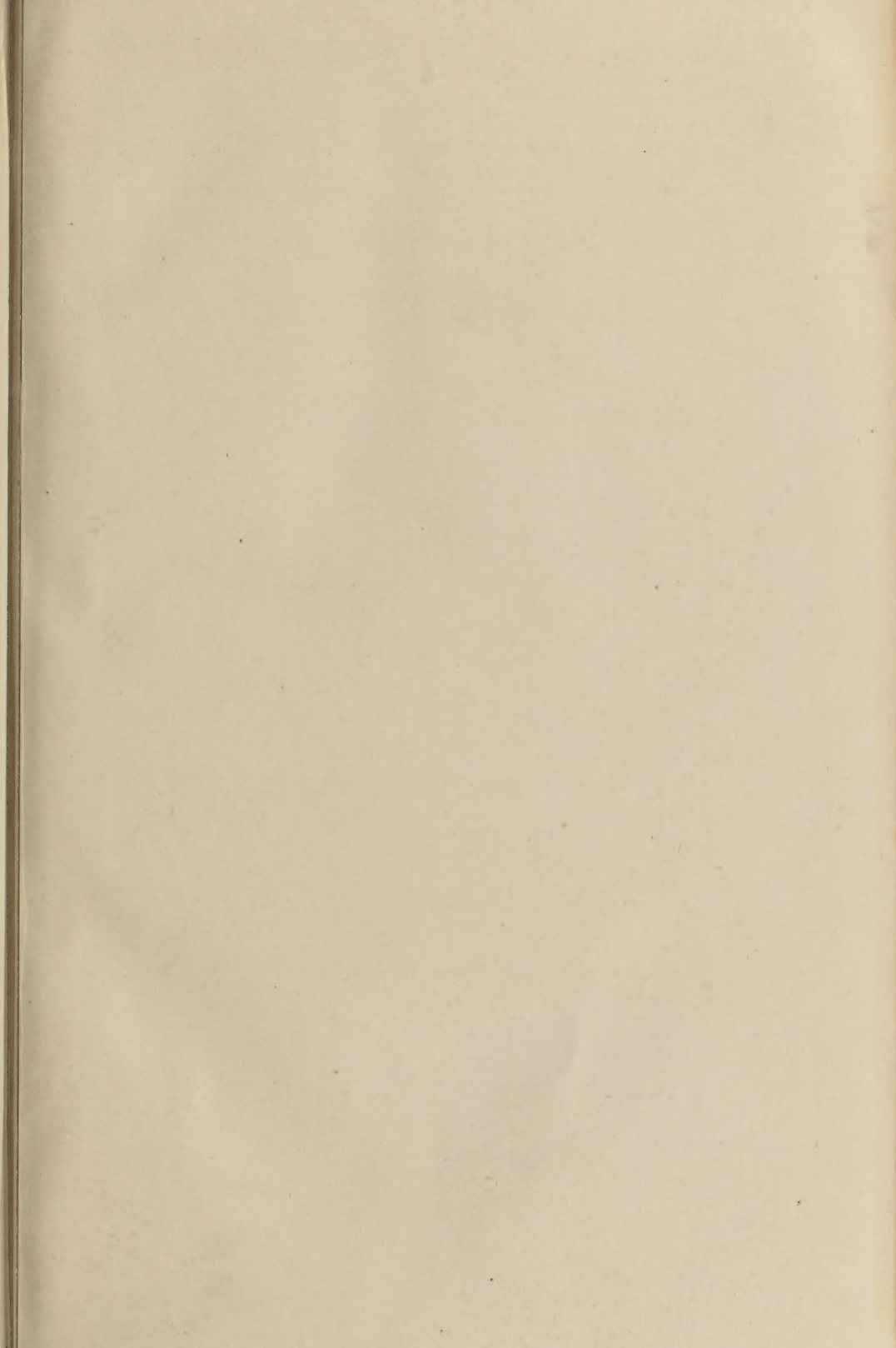
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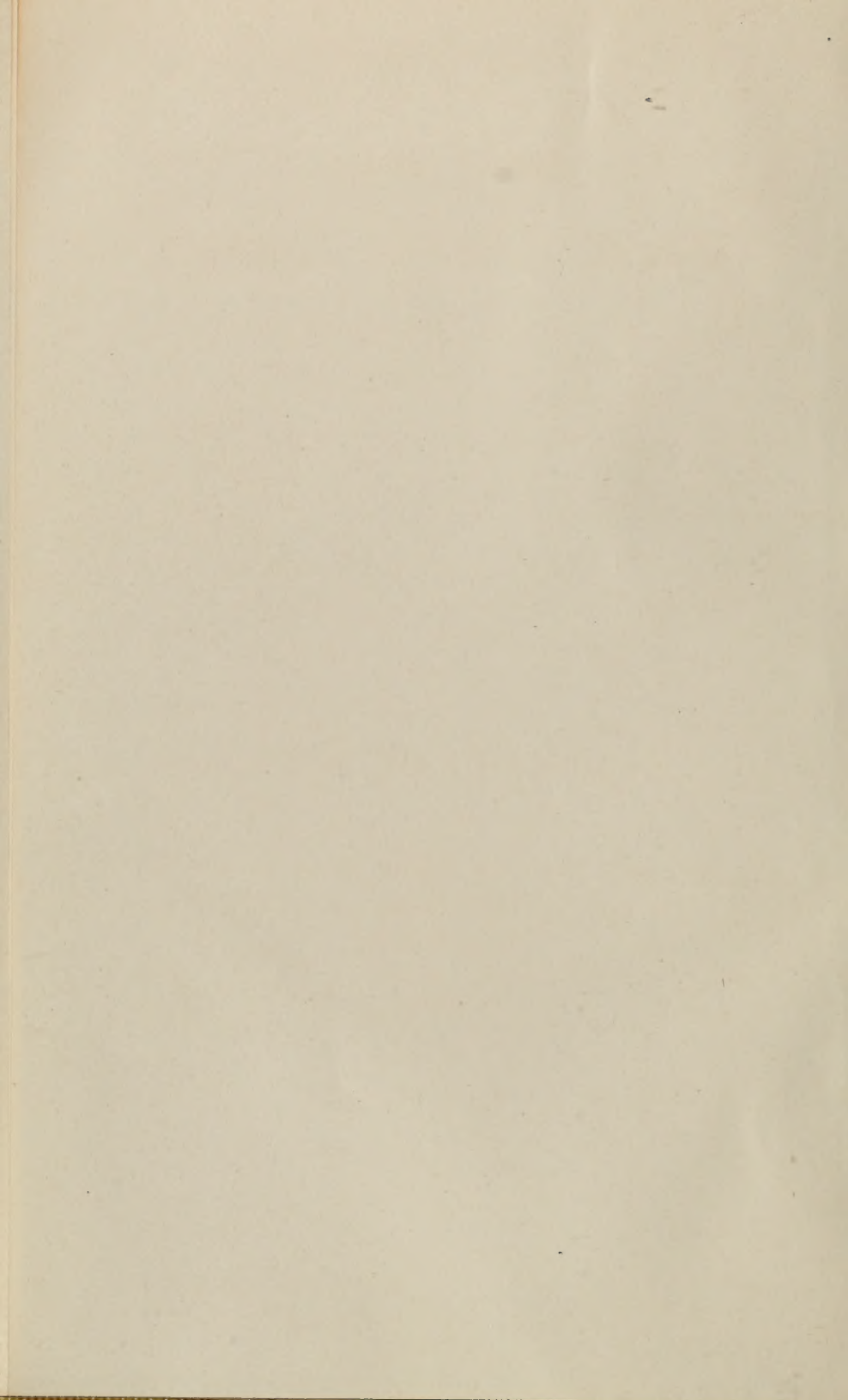
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United States
Circuit Court of Appeals
For the Ninth Circuit.

CHOY GUM, Sometimes Referred to as LO KING,
Appellant,
vs.

SAMUEL W. BACKUS, as Commissioner of Immi-
gration at the Port of San Francisco,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court
for the Northern District of California,
First Division.

Filed
NOV 6 1914
F. D. Monckton,
Clerk,

United States
Circuit Court of Appeals
For the Ninth Circuit.


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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Affidavit of Dennis Bohle.....	51
Affidavit of Arthur D. Layne.....	50
Affidavit of Bow Shee.....	44
Affidavit of Gee Shee.....	46
Affidavits of Toy On and Ma Sing.....	48
Affidavit of Leung Tan.....	43
Application for Warrant of Arrest Under Sec- tions 20 and 21 of the Act of February 20, 1907.....	31
Assignment of Errors.....	59
Bond on Appeal.....	66
Certificate of Clerk U. S. District Court to Tran- script of Record.....	68
Citation on Appeal—Copy.....	65
Citation on Appeal—Original.....	69
Demurrer to Petition for Writ of Habeas Corpus.....	55

EXHIBITS:

Exhibit "A" to Petition for Writ of Habeas Corpus.....	13
Exhibit "B" to Petition for Writ of Habeas Corpus.....	39
Hearing in Choy Gum Case, Continued.....	39

Index.	Page
Minutes of Court—April 16, 1914—Order to Show Cause.....	54
Notice of Appeal.....	64
Opinion and Order Sustaining Demurrer to Petition for Writ of Habeas Corpus and Denying the Petition.....	56
Order Allowing Petition for Appeal.....	63
Order Denying Petition.....	58
Petition for Appeal.....	58
Petition for Writ of Habeas Corpus.....	2
Praecipe for Transcript on Appeal.....	1
Telegram—September 20, 1912, Backus to “Immigration”.....	30
Telegram—September 21, 1912, Chas. Earl, Act. Secy., to Immigration Service.....	32
Telegram—September 26, 1912, B. S. Cable, Act. Secy., to Immigration Service.....	33
Telegram—September 25, 1912, Backus to “Immigration”.....	33
TESTIMONY TAKEN BEFORE IMMIGRATION INSPECTOR:	
GUM, CHOY.....	13, 35
LAN, TON YOOK.....	18
TOE, LEONG.....	16
GO WONG.....	22
Warrant—Arrest of Alien.....	34
Warrant—Deportation of Alien.....	52

Praeceptum for Transcript on Appeal.

UNITED STATES OF AMERICA.

District Court of the United States, Northern District of California.

Clerk's Office—No. 15,641.

In the Matter of CHOY GUM, *Alias* LO KING,
on Habeas Corpus.

To the Clerk of Said Court:

Sir: Please make up Transcript of Appeal in the above-entitled case, to be composed of the following papers, to wit:

1. Petition for Writ of Habeas Corpus.
 2. Demurrer to Petition.
 3. Opinion and Order Sustaining Demurrer to
Petition for Writ of Habeas Corpus and
Denying the Petition.
 4. Petition for Appeal.
 5. Assignment of Errors.
 6. Order Allowing Appeal.
 7. Notice of Appeal.
 8. Cost Bond on Appeal.
 9. Citation and Copy.
 10. Clerk's Certificate.
 11. Order to Show Cause on Petition for Writ.
- [1*]

GEO. A. MCGOWAN,
Attorney for Petitioner.

[Endorsed]: Filed Aug. 11, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [2]

*Page-number appearing at foot of page of original certified Record.

*In the District Court of the United States, in and
for the Northern District of California, Division
No. One.*

No. 15,641.

In the Matter of CHOY GUM, Sometimes Referred
to as LO KING, on Habeas Corpus.

Petition for Writ of Habeas Corpus.

To the Honorable MAURICE T. DOOLING, United
States District Judge in and for the Northern
District of California:

The Petition of Wong Shee respectfully shows:

That Choy Gum, sometimes referred to as Lo King
and hereinafter in this petition referred to as the
detained, is unlawfully imprisoned, detained, con-
fined, and restrained of her liberty under the order
and by the direction of the Secretary of Labor, who is
the official successor now exercising those rights and
functions formerly exercised by the Secretary of
Commerce and Labor which are hereinafter referred
to and complained of. That the said detained is in
the immediate custody of Samuel W. Backus, Com-
missioner of Immigration for the Port of San Fran-
cisco, at the Immigration Station at Angel Island,
Marin County, State of California, Northern Dis-
trict. That the said imprisonment, detention, con-
finement and restraint are illegal, and that the illegal-
ity thereof consists in this to wit: That it is claimed
by the said Secretary of Labor and the said Samuel
W. Backus, Commissioner as aforesaid, that the said
detained is an alien Chinese person. That she en-

tered the United States on or about the 23d day of October, 1908, through the Port of San Francisco, where she arrived from China on the steamer "China," and that she was thereafter permitted to enter the United [3] States by the appropriate immigration officials as the wife of a native-born citizen of the United States, and that she has continued since said time to be a resident of the United States of America and of the State of California; and further, that upon the 20th day of September, 1912, the detained was arrested in the City of San Francisco, State of California, and charged with being a prostitute and with having been found practicing prostitution subsequent to her entry into the United States, and that thereafter, and upon the 26th day of September, 1912, a warrant for her arrest was issued by the Secretary of Commerce and Labor at Washington, D. C., and that upon the 10th day of October, 1912, the right of counsel was accorded the said detained and upon said day George A. McGowan was accepted by and appeared for the said detained as her attorney; and that after a pretended hearing had under the authority contained in said warrant, the Secretary of Commerce and Labor issued a warrant of deportation against the detained upon the charge hereinbefore cited, and ordered the detained deported to the Empire of China, the country from which she came. That during the proceedings had under the said warrant of arrest the detained was released on bail by the Secretary of Commerce and Labor in the sum of Three Thousand Dollars, and that the detained continued to be at large upon bail, as permitted

under said warrant of arrest, until she was surrendered into custody by direction of the said Samuel W. Backus, Commissioner as aforesaid, to render herself amenable to the said warrant of deportation. It is further claimed by the said Samuel W. Backus that he now holds said detained in his possession by virtue of said warrant of deportation, and that it is his purpose and intention to execute the said warrant by causing the detained to be deported upon the steamship "China," sailing from the Port of San Francisco at one P. M. on April 18th, 1914. It is further claimed by the said Samuel W. Backus that the action of himself and the Secretary of Commerce and Labor and the Secretary of Labor [4] in the premises is authorized by the provisions of the Act of Congress of February 20th, 1907, entitled: "An Act to regulate the Immigration of Aliens into the United States," and the Act amendatory thereof of March 26th, 1910.

But on the contrary, your petitioner alleges that the proceedings as a result of which said warrant of deportation herein was issued, were unfair and unjust and contrary to the statutes in such cases made and provided, and contrary to and in violation of the rules and regulations promulgated under the authority conferred by said Act or Acts of Congress, and as a result thereof the detained is deprived of her liberty without due process of law, in this, that the detained was denied a fair opportunity to either test the sufficiency or weight of the evidence presented against her or to present her defense to the charge brought against her in the said warrant of arrest, in

the following particulars:

First: That on October 10th, 1912, the detained was arraigned and informed of the charge brought against her and allowed an attorney and her attorney permitted to inspect and make a copy of the minutes of the hearing so far as it had proceeded and in compliance therewith saw and had copied:

The testimony of Choy Gum, Leong Toe, Ton Yook Lan and Wong Go, given on September 20th, 1912; telegraphic and formal application for warrant of arrest; telegraphic refusal to issue warrant; second telegraphic application for warrant of arrest; telegraphic and formal warrant of arrest, which was everything contained in said record at said time, and thereafter procured a copy of the proceedings had on the said 10th day of October, all of which are hereunto annexed and marked Exhibit "A," the hearing thereupon adjourned.

That on November 7th, 1912, the hearing was resumed and the detained protested to the incorporation in the record against her, of the testimony of Leong Toe, Ton Yook Lan and Wong Go and in permitting [5] said testimony to remain in said record this detained was not accorded a fair hearing for the reason that said testimony was not taken in the case against the detained and the respective witnesses were not sworn to tell the truth in the case of this detained, but on the contrary, each of said witnesses were being examined on oath touching their own right to be and remain in the United States and were not impartial and unbiased witnesses against this detained, but were on the contrary actu-

ated by motives of self-interest and self-protection, and such testimony as was detrimental to the detained was induced by methods of coercion, detention and imprisonment and was given in the hope or promise of the witness being restored to their liberty, and the said witnesses Wong Go and Ton Yook Lan were accordingly not proceeded against. That the request of the detained that the said witnesses be called so that they might be cross-examined on her behalf was not granted and the hearing was closed without affording the detained any opportunity to cross-examine said witnesses or any of them, so that it might be shown on behalf of the detained that the statements alleged to have been made in their said respective examinations which were detrimental to the detained were untrue, and that the said witnesses did not have sufficient knowledge to justify them in making said detrimental statements attributed to them, and that they were actuated by motives of self-interest and were testifying under coercion and while under duress and imprisonment and in the hope of obtaining their liberty in consideration for their testimony, and that in so abridging and limiting the right of counsel of the said detained she was and has been prevented from showing the falsity of the said evidence presented on behalf of the Government against her, the said detained, and that the hearing at which said purported evidence was presented was in reality nothing but the semblance of a hearing at which the rights of the said detained could not be adequately or at all protected. [6]

Second: That the detained was accorded the right of counsel on the 10th day of October, 1912, as aforesaid, and upon said day Geo. A. McGowan, Esq., appeared as her attorney and ever since has been the attorney of record therein. That upon the 15th day of October, 1912, a further hearing was had herein wherein the testimony of Arthur T. Layne and Dennis Bohle was taken against the detained and without notice to either the detained or her attorney, and in their absence, and that the said testimony was embodied in the form of two affidavits signed and sworn to respectively by each of said witnesses before an Immigration Inspector in San Francisco, within easy access of the detained and her attorney had they received even telephonic notice thereof. That the fact that said hearing had taken place or that said testimony in the form of affidavits, had been taken, was not made known to and was withheld from the detained and her attorney until the 7th day of November, 1912, when the said affidavits were formally offered in evidence against the detained, and the specific request of the detained that the said witnesses be recalled for cross-examination was denied and the hearing of the case against the detained was closed over her protest without granting the detained an opportunity to test the knowledge of the said two witnesses, and that in denying the right of cross-examination of the said witnesses as aforesaid your petitioner alleges upon information and belief that the detained was prevented from showing, as alleged in said two affidavits, that the general reputation of the premises situated at No. 5

St. Louis Alley mentioned in said affidavit was that of a house of prostitution, and that it had such a reputation upon the 20th day of September, 1912, and that in denying the right of cross-examination of said witnesses the detained was prevented from showing that the said recitals of the two (2) said Government witnesses in their said two affidavits were false and untrue, and that the said witnesses had not sufficient information and knowledge or any [7] information or knowledge as a basis for the said averments contained in their said affidavits, and that they were interested witnesses making self-serving statements. That the specific request of the detained for an opportunity to meet the evidence contained in said two affidavits, the very existence of which was only made known to the detained at said hearing, was denied and said hearing immediately closed without permitting the detained any opportunity to meet the matter contained in said two affidavits so taken and used as aforesaid. That annexed hereto and marked Exhibit "B" is contained a copy of the minutes of the hearing on November 7th, copies of the affidavits submitted by the detained in her defense, copies of the said two affidavits of Arthur D. Layne and Dennis Bohle, and lastly the warrant of deportation.

Third: Your petitioner further alleges that after the conclusion of said pretended hearing and when the rights of the said detained could not be properly or at all safeguarded, the said Immigration Inspector-in-Charge Ainsworth or the said Commissioner did, your petitioner alleges upon information and belief,

submit evidence of some kind, detrimental to said detained, to the Secretary of Commerce and Labor, and that the said evidence was never presented to the said detained, nor was an inspection thereof permitted or allowed, and that by reason of the said acts of the said officers the detained was denied any opportunity to see and inspect said evidence and to rebut the same, and that in so abridging and limiting the right of counsel of the said detained she has been prevented from showing the falsity of the said evidence believed to have been so presented by the said officers against the said detained. No copy of said report or evidence is submitted herewith for the reason that the detained has not now and never has had, nor has she been able to procure a copy thereof. [8]

Fourth: Your petitioner alleges that the hearing accorded herein has been nothing but the semblance of a hearing and has been grossly unfair to the said detained in this, that the Government officers conducting said hearing have elected to take their evidence from witnesses by question and answer, while withholding the right of counsel from the detained, and after the right of counsel was allowed, to then present their evidence in the form of affidavits and refusing to produce the witnesses giving the testimony in said affidavits at a hearing where they could be examined by the detained, and in further directing the defendant to submit her defense in the form of affidavits, attempting by such action to legalize their use of affidavits against the detained, and thus preventing the detained from the right to have her wit-

nesses present and give their testimony orally before the said officers. Your petitioner alleges that there is not a question involved in this matter of the power of the Government to bring witnesses before the Inspector for examination, for the reason that the two said witnesses, Arthur D. Layne and Dennis Bohle did actually appear before a Government Inspector at the time they gave their testimony embodied in said affidavits, and they further would have presented themselves for examination before said Immigration officers at any convenient time and place regarding which they had reasonable previous notice, providing, always, had they been so requested by the said Immigration officials.

Fifth: Your petitioner further alleges that the said detained has at all times during her residence in the United States, been a woman of respectability and good moral character, and that she has at no time followed any immoral occupation or engaged in any immoral or debasing pursuits, nor has she followed the occupation or avocation of a prostitute, and that the evidence presented on behalf of the said detained affirmatively and abundantly established these facts; but the action of the said Immigration [9] officers in preventing the said detained from a fair and adequate opportunity to present her defense, *ad* hereinabove set forth, was, your petitioner alleges upon information and belief, the immediate cause of the issuance of the said warrant of deportation herein.

That your petitioner has annexed hereto in said Exhibits "A" and "B" a full copy of the proceed-

ings as a result of which it is sought to deport the said detained, with the single exception of the evidence or final reports mentioned subdivision Three on page six hereof, which last mentioned evidence or reports are considered as private and secret communications and no copy thereof has been or can be obtained by your petitioner.

That the said Samuel W. Backus is endeavoring to execute the said warrant of deportation by deporting the said detained on the steamship "China," sailing from the port of San Francisco at One o'clock P. M. on the 18th day of April, 1914, and unless this Court intervenes the said detained will be carried beyond the jurisdiction of this Court.

That your petitioner is a friend of the said detained and makes this petition upon her behalf, as she is now in the custody of the Commissioner of Immigration for the Port of San Francisco, and is therefore unable to execute the same.

WHEREFORE, YOUR PETITIONER PRAYS that the Writ of Habeas Corpus, prayed for herein, may issue, directed to the said Samuel W. Backus, staying the said order of deportation and directing him to produce the body of the said detained before your Honor at a time and place to be specified in said Order, together with the time and cause of the detention of the said detained, and your petitioner further prays that the said detained may be released

in the sum of \$3,000.00 during the further proceedings to be had in this matter. her

WONG X SHEE,
mark.

Petitioner.

GEO. A. MCGOWAN,

Attorney for Petitioner. [10]

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

Wong Shee, being duly sworn, deposes and says: That *he* is the petitioner named in the foregoing petition; that the same has been read and explained to *him* and *he* knows the contents thereof; that the same is true of *his* own knowledge except as to those matters which are therein stated on *his* information and belief, and as to those matters *he* believes it to be true.

Her

WONG X SHEE.

Mark.

Subscribed and sworn to before me this 15th day of April, 1914.

[Seal]

HARRY L. HORN,

Notary Public in and for the City and County of San Francisco, State of California.

Wong Shee being unable to write, at her request, and in her presence I wrote her name after she had made her mark.

HARRY L. HORN [11]

Exhibit "A" [to Petition for Writ of Habeas Corpus].

DEPARTMENT OF COMMERCE AND LABOR.
Immigration Service.

No. 1032/231.

Angel Island, Cal., Sept. 20, 1912.

In re CHOY GUM, Taken into Custody as Alien
Chinese Practicing Prostitution.

Examining Inspector—F. H. AINSWORTH.

Interpreter—J. S. McClymont.

Stenographer—L. E. Dinklage.

[Testimony of Choy Gum.]

Alien sworn through Interpreter.

Q. What is your name? A. Choy Gum.

Q. Any other name? A. Only one name.

Q. How old are you? A. 21.

Q. What is your father's name?

A. Choy Keung.

Q. Any other names your father is known by?

A. No other name.

Q. What is your mother's name?

A. Fung Shee.

Q. What is your father's village?

A. Lai Lung (Leung) Village.

Q. Has he always resided in that village?

A. He is in the United States now.

Q. Has your mother always resided in that village?

A. My mother died when I was a little girl.

Q. Did she always live in that village before she

(Testimony of Choy Gum.)

died? A. Yes, when I was a little girl.

Q. Did she ever leave that village at all?

A. My mother died in the United States.

Q. When? How long ago?

A. I do not remember. She died when I was a little girl.

Q. How long had she lived in the United States before her death?

A. She came with me to the United States when I was two years old.

Q. Were you born in this village in China?

A. Yes.

Q. When did you arrive in the United States? Nineteen years ago? A. Yes.

Q. On what steamer? Do you remember?

A. I do not know. [12]

No. 1032/231.

9/20/12.

Q. Did your father come with you at that time?

A. Yes.

Q. Where is your father now? A. Isleton.

Q. When did you see your father last?

A. I saw him at Isleton little over a month ago.

Q. Are you married or single?

A. I was engaged to a man and he died and I did not marry.

Q. How long have you been following this life you were found in this morning?

A. I did not follow any particular life. Sometimes I come out from the country I stay there.

Q. This place where you were found this morning is a well known house of prostitution. How long

(Testimony of Choy Gum.)

have you been living there?

A. I did not know it. I have been staying there for the last two days.

Q. How much rent did you pay for your room?

A. I went there with a woman. I know this woman pretty well, but I did not arrange as to how much I should pay.

Q. What is the woman's name?

A. Old lady. I just call her Ah Moo (meaning aunt).

Q. Was she the woman in the house this morning?

A. I do not know where she is now, but that was not the woman.

Q. But that is the woman who keeps the house, the woman we saw there this morning?

A. I did not investigate. I do not know.

Q. Do you not know she was the landlady?

A. No, I did not know. I did not investigate.

Q. Who furnished your meals?

A. I ate last night at her place, but yesterday I ate at another place.

Q. Were you not captured in a place trying to get up on the roof?

A. I heard a noise outside of people trying to break in. People ran and I just followed them.

Q. Who directed you to that place?

A. Nobody. I just followed. I saw people going that way and I just followed. [13]

No. 1032/321.

9/20/12

(Testimony of Leong Toe.)

I hereby certify to the correctness of the foregoing transcript.

L. E. DINKLAGE,
Stenographer. [14]

[Testimony of Leong Toe.]

DEPARTMENT OF COMMERCE AND LABOR.
Immigration Service.

No. 1032/230.

Angel Island, Cal., Sept. 20, 1912.

In re LEONG TOE, Taken into Custody as an Alien
Chinese Practicing Prostitution.

Examining Inspector—F. H. AINSWORTH.

Interpreter—J. S. McCLYMONT.

Stenographer—L. E. DINKLAGE.

Alien sworn through Interpreter.

Q. What is your name? A. Leong Toe.

Q. No other names? A. No.

Q. How old are you? A. 23.

Q. What is your father's name?

A. Leong Gum.

Q. Has he any other names? A. No.

Q. What is your mother's name?

A. I do not know. She died when I was a little girl.

Q. Where did she die? A. In China.

Q. Had she always lived in her home village?

A. Yes.

Q. Where is your father now?

A. Hongkong.

Q. Was he ever in the United States? A. No.

(Testimony of Leong Toe.)

Q. When did you come to the United States?

A. ST-1; second 2d month, on the "Chiyo Maru."

Q. Under what condition did you come in?

A. As the wife of Low Shee Yow.

Q. Where is he now? A. He is in the country.

Q. When did you see him last?

A. Little over a year ago.

Q. How long have you been practicing prostitution?

A. I do not live there. I live on Pacific Street.

Q. What number Pacific Street? A. 773.

Q. I want to know how long you have been staying at this house of prostitution where you were arrested this morning?

A. I went there to visit about seven o'clock last night and I talked to my friend until it was very late and I decided to stay there for the night, until the officers came in and broke down the door and [15]

No. 1032/230

9/20/12.

I was afraid and followed the people up.

Q. What is your friend's name you went to visit?

A. I do not know her name. People call her an Ah So (meaning a "madame").

Q. Is it one of the girls who came over this morning? A. No.

Q. Was she the woman who stayed in the house?

A. She works there.

Q. Was she there this morning when you were arrested? A. Yes.

Q. As a matter of fact you have been practicing prostitution in that house have you not? A. No.

(Testimony of Ton Yook Lan.)

I hereby certify as to the correctness of the foregoing transcript.

L. E. DINKLAGE,
Stenographer. [16]

[Testimony of Ton Yook Lan.]

DEPARTMENT OF COMMERCE AND LABOR.

Immigration Service.

Angel Island Station,
San Francisco, California,
September 20, 1912.

File No. 1032/232.

In re TON YOOK LAN, who was brought to this
Station Sept. 20, 1912.

PRESENT:

Examining Inspector—F. H. AINSWORTH.

Stenographer—S. W. BUCHANAN.

Interpreter—J. S. McCLYMONT.

Alien sworn through Interpreter.

(By Examining Inspector.)

Q. What is your name? A. Ton Yook Lan.

Q. Have you any other name?

A. No other names.

Q. How old are you? A. Sixteen (16).

Q. What is your father's name? A. Tom Bok.

Q. Has he any other names?

A. No other names.

Q. What is your mother's name?

A. Hor Shee; she died.

Q. Where did she die?

A. She brought me here last year from China then

(Testimony of Ton Yook Lan.)

she went back herself and died.

Q. What steamer did you come on?

A. I do not remember the name of the steamer—the steamer arrived just about a month before Chinese New Year.

Q. Was it a Japanese steamer? What kind of a smokestack did it have?

A. One smokestack—black.

Q. Did anybody else come besides yourself and your mother?

A. Just myself and mother; I have two brothers and one sister here. I was landed once before—I went back to China when I was seven years old.

Q. When did you first come to the United States?

A. Not landed once before,—I went back to China when I was seven years old and I came back here when I was fifteen years old.

Q. Did your mother go back to China when you did?

A. Yes, [17] with my brothers and sister.

No. 1032/232

9/20/12

Q. Where is your father?

A. He died before I went back to China.

Q. In what village did you live?

A. See Jee Tow Village.

Q. Did your mother always live in that village?

A. Yes.

Q. Did your mother live there when you were born?

A. I was born in San Francisco, under the store of Quong Qing Tai—my father was in business.

(Testimony of Ton Yook Lan.)

Q. How long have you been living in this house of prostitution?

A. I went there day before yesterday from Stockton—my brother took me there to study English and it being too hot I just came down here for a change of air.

Q. You know this is a house of prostitution?

A. People told me it was a ladies boarding-house kept by Ah Gum.

Q. Was that the lady we saw there this morning?

A. Yes. That is my godmother.

Q. Where was she born?

A. I don't know—she is not really my godmother, I just call her that.

Q. The other girls there entertained men did they?

A. Yes, they had men in their rooms over night.

Q. This man that was in there told me that he spent the night with one of those girls; do you know anything about that?

A. I don't know about that—I didn't see him in her room but I saw him coming out of an adjoining room.

Q. Did any of those men make any advances to you while you were there? A. No.

Q. Do you understand that the reputation of that place was that of an immoral house?

A. I don't know, I only stayed there a few nights that is all.

Q. Did you pay board to Ah Gum? A. No.

Q. Who paid your board?

A. She want to be mo godmother and [18] I

(Testimony of Ton Yook Lan.)

No. 1032/232

9/20/12

don't have to pay her anything.

Q. Can you tell me the name of anybody who can testify that you were not in this house four days ago?

A. I was staying in a rooming house in Stockton; that place is occupied by a few boy students.

Q. Any other women? A. No.

Q. What is the number of the rooming house in Stockton? What street?

A. Street next to the street where Chinatown is at.

Q. Do you know the name or number of the street?

A. The number of the house is 14, but I do not know the name of the street.

Q. What is your brother's name?

A. Ton Bing Lan.

Q. Where does he live?

A. He is working in the Quong Tai store until he got a telegram that my mother is dead and he went back.

Q. Didn't you tell me that your brother brought you to this house the night before?

A. I meant nobody took me there to the house—the fat lady invited me to the house.

Q. Have you ever had sexual intercourse with any men?

A. No. I lost my virginity in China.

Q. Have you had any intercourse with men since you have been back? A. Not in this country.

(Testimony of Wong Go.)

I certify to the correctness of the foregoing transcript.

S. W. BUCHANAN,
Stenographer. [19]

[Testimony of Wong Go.]

DEPARTMENT OF COMMERCE AND LABOR.

Immigration Service.

Angel Island, Cal., Sept. 20, 1912.

No. 1003/39.

In re WONG GO, Alleged to be in the United States
Illegally.

Examining Inspector—F. H. AINSWORTH.

Interpreter—WHOE TONG.

Stenographer—L. E. DINKLAGE.

Alien sworn through Interpreter.

Q. What is your name? A. Wong Go.

Q. Any other names? A. No other name.

Q. How old are you? A. 24 years of age.

Q. What is your father's name?

A. Wong Suey San.

Q. Father have any other names?

A. Wong Foo.

Q. Any other names? A. No.

Q. What is your father's business?

A. Merchant.

Q. Where? A. Sun Fook Chong, Stockton.

Q. What street Stockton?

A. Corner of Washington Street and another
street. I do not remember the name.

Q. What is your mother's name?

(Testimony of Wong Go.)

A. I forgot my mother's name.

Q. Did you ever hear your mother's name?

A. I heard it but I do not remember now.

Q. Where is your mother now? A. In China.

Q. Where is your father now?

A. Returned to China.

Q. What is your father's village?

A. Lung Fat Village; H. S. District.

Q. Has your father always resided in that village?

A. Yes.

Q. Has your mother always resided in that village? A. Yes.

Q. Did your father ever leave that village for a short time? A. Only came to the United States.

Q. Did your mother ever leave the village?

A. No.

Q. Mother always lived in that village?

A. Yes.

Q. Never been away on any pretext?

A. No. [20]

No. 1003/39

9/20/12

Q. Has your father any other wives? A. No.

Q. Ever have any other wives?

A. No, only one wife.

Q. Have you any brothers or sisters?

A. One younger brother; no sisters.

Q. What is the younger brother's name?

A. I do not know his name. I left China before he was born.

Q. When did you leave China?

(Testimony of Wong Go.)

A. Arrived here KS-28; 10th month; S/S
"China."

Q. What is your occupation?

A. I am staying in my father's store.

Q. Where? A. In Stockton.

Q. You were not arrested in your father's store
in Stockton, were you?

A. No. I came up from there.

Q. Has your father still got an interest in this
store in Stockton? A. Yes.

Q. Does your father expect to return to the United
States again? A. Yes.

Q. When did your father go away?

A. I do not remember what year he went to
China. About three or four years ago, I think.

Q. Was your mother living when you left China?

A. Living.

Q. And you do not remember what you called her
ten years ago? A. I forgot suddenly.

Q. Did she have bound feet or natural feet?

A. Bound feet.

Q. What do you do for a living? Where do you
get your income to live?

A. From the store where my father has an inter-
est in.

Q. How much interest has your father got in that
store? A. I do not know how much.

Q. How much do you receive, income from it?

A. Little over \$300 a year.

Q. Is that your only source of income?

A. That is all.

(Testimony of Wong Go.)

Q. Does your father receive any income from the store besides the \$300 you get?

A. I do not know how much he received. The manager attends to it. [21]

No. 1003/39

9/20/12

Q. What is the manager's name?

A. Wong Suey Sing.

Q. Do you take any part in the business of that store in Stockton—salesman, bookkeeper, manager or anything?

A. General helper. Sometimes do a little delivery.

Q. Do you ever sell anything? A. Yes.

Q. Do you receive pay for your services or pay from your father's interest?

A. Yes. I receive a little over \$300 a year salary.

Q. Then you do not receive anything from your father's investment?

A. My father gave me \$500 or \$1000 interest. I do not remember which.

Q. You state now you receive \$300 a year from that store in return for services. Now, I ask you, do you receive any income from the store from your father's investment in the store? A. No.

Q. Are you married?

A. Not married; never been married.

Q. Have you ever been back to China since you first came? A. No.

Q. Made no trips? A. No trips.

Q. When did you leave Stockton this time?

A. Four or five months ago.

(Testimony of Wong Go.)

Q. Have you been living in San Francisco ever since?

A. Always in San Francisco during that period.

Q. What have you been doing for a living since you have been in San Francisco the last four or five months?

A. I sent the money from the Sun Fook Chong.
Hearing adjourned.

Hearing resumed later, with Interpreter McClymont in lieu of Interpreter WHOE TONG.

Q. Where did you derive your source of income while in San Francisco?

A. I saved some money from raising potatoes and speculation. [22]

No. 1003/39

9/20/12

Q. When were you raising potatoes? What period?

A. I did not raise potatoes myself but I invested some money about four years ago.

Q. Do you mean to say you have leased or owned a piece of land on which potatoes are raised?

A. No. I invested some money with some people who have land.

Q. Who are these people you invested with?

A. Hong Ah Lung is one of them.

Q. Where does he live?

A. Farmer in Stockton.

Q. How much money did you invest in this potato enterprise? A. I invested \$600.

Q. Where did you get that \$600?

(Testimony of Wong Go.)

A. I borrowed some of that money and some I saved up.

Q. When did you enter the house in which you were arrested this morning?

A. I do not live there but I just visit there.

Q. Where do you live?

A. I room on Jackson Street above the store of Tai Seng.

Q. What number on Jackson Street?

A. I do not know. I am a stranger in San Francisco. It is on Jackson Street above that store.

Q. Whom did you go to visit in this house in which you were arrested?

A. I know a man there but I do not know his name.

Q. Were you not with three girls trying to escape?

A. Yes.

Q. Is it not a fact that you went to visit one of those girls?

A. I intended to have a feast up there in that place.

Q. Didn't you have a feast last night?

A. I was going to have, but I did not have it.

Q. Were any of the girls going to join you in the feast?

A. No. I did not intend to visit those girls at all. I expected to meet a friend there.

Q. Who was the friend you expected to meet?

A. His name is Ah Gum. He was one of the men arrested and released afterwards. [23]

(Testimony of Wong Go.)

No. 1003/39

9/20/12

Q. Do you know anybody else in that house?

A. He is the only one I know.

Q. What room did you occupy in that house last night?

A. I do not know the number of the room. It was a vacant room I occupied.

Q. Who owns that rooming house?

A. I do not know.

Q. How much did you pay for the night's lodging?

A. I did not have to pay any rent. I went there to visit a friend.

Q. Did your friend pay your lodging?

A. I do not know whether he did or not.

INSPECTOR'S NOTE: The woman who keeps the house is known as Ah Gum.

Q. Did you ever visit the house before last night?

A. No.

Q. What was your purpose in trying to escape if you were there simply to visit a friend?

A. I was a stranger in town and I heard a noise—people trying to break in—and I thought some of the tong men were trying to get me.

Q. Why should they try to get you?

A. I was afraid that they would make a mistake and hurt me.

Q. What are the names of the girls who came down in the taxicab with you?

A. I do not know their names.

Q. Did you ever see any of them before?

(Testimony of Wong Go.)

A. No. I heard the noise of people trying to break in and the girls trying to run away and I followed them.

Q. How is it you followed the girls instead of the men if you were visiting your friend?

A. I though there was fighting going on and I was a stranger in town; I just followed the girls.

Q. Is it not a matter of fact that you occupied a room last night with a woman in that building?

A. No.

Q. You are going to stand on that statement, are you? A. Yes.

Q. And you won't want to change this statement if I bring [24] evidence that you occupied a room

No. 1003/39

9/20/12

with a woman?

A. Yes; I slept with a woman last night.

Q. What is her name?

A. I do not know her name.

Q. One of these three? A. Yes.

Q. Which one of the three was it?

A. I cannot recognize her.

Q. One of those three who came down with you?

A. Yes.

Q. How much did you pay to sleep there all night?

A. I did not pay.

Q. Who did pay?

A. I did not pay. I do not know who paid.

Q. Do you mean to say that you walked into a house and walked into a room where a woman was and occupied the room with her and did not pay her

(Testimony of Wong Go.)

anything? Why don't you tell the truth?

A. She did not sleep in the same room with me.

Q. Have you any additional statement to make?

A. No.

Q. Have you ever been arrested by the local authorities for any misdemeanor or crime? A. No.

Three Chinese girls brought in:

Q. Which one of these three girls did you sleep with? A. The one sitting down.

Q. (To Chinese girl indicated.) What is your name? A. Choy Gum.

Q. And is this the man who slept with you last night?

A. No, he slept in the room next to mine.

A. No.

(Wong Go answers "No" at the same time.)

I hereby certify as to the correctness of the foregoing transcript.

L. E. DINKLAGE,

Stenographer. [25]

[Telegram—September 20, 1912, Backus to "Immigration."]

Night.

Postal Telegraph.

Commissioner,

Angel Island, Cal., September 20, 1912.

Immigration, Washington, D. C.

Wadding Leong Toe arrived March nineteen nine and Choy Gum arrived nineteen years ago prognosis.

Recommend relegate thirty each case.

BACKUS.

ATTEST: (Sgd.) SAMUEL W. BACKUS,
Commissioner.

1032/231-230

FHA/LED.

NOTE—The above is telegraphic application for warrant of arrest.

L. E. D. [26]

COPY.

**Application for Warrant of Arrest Under Sections
20 and 21 of the Act of February 20, 1907.**

DEPARTMENT OF COMMERCE AND LABOR.

IMMIGRATION SERVICE.

No. 1032/230.

“ 1032/231.

(Place) San Francisco, Cal.,

September 20, 1912.

Confirming telegram of even date—

The undersigned respectfully recommends that the Secretary of Commerce and Labor issue his warrant for the arrest of Leong Toe and Choy Gum, the alien named in the attached certificate upon the following facts which the undersigned has carefully investigated, and which, to the best of his knowledge and belief, are true:

(1) (Here state fully facts which show alien to be unlawfully in the United States. Give sources of information, and, where possible, secure from informants and forward with this application duly verified affidavits setting forth the facts within the

knowledge of the informants.)

The above named aliens were found in a well known house of prostitution in San Francisco. Leong Toe claims to have been in the United States since 1909 and Choy Gum claims to have been here for nineteen years, although only twenty-one years of age now.

(2) The present location and occupation of above-named alien are as follows:

Detained at Angel Island Station, Cal. [27]

Pursuant to Rule 35 of the Immigration Regulations there is attached hereto and made a part hereof the certificate prescribed in paragraph (c) of said Rule, as to the landing or entry of said alien, duly signed by the immigration officer in charge at the port through which said alien entered the United States.

(Signature) (Sgd.) SAMUEL W. BACKUS,
(Official Title) Commissioner.

FHA/LED.

Copy—LED. [28]

**[Telegram—September 21, 1912, Chas. Earl, Act.
Secy. to Immigration Service.]**

Copy of Telegram.

Washington, D. C., Sept. 21, 1912.

Immigration Service.

Arrow Leong Toe prognosis relay thirty. War-rant arrest will not issue for Choy Gum.

CHAS. EARL,
Act. Secy.

Copy—LED. [29]

[Telegram—September 25, 1912, Backus to
“Immigration.”]

Night.

Postal Telegraph

Commissioner,

Angel Island, Cal., September 25, 1912.

Immigration, Washington, D. C.

Department telegram September twenty-first declining to issue warrant for Choy Gum. It now appears that Chou Gum's true name is Lo King landed October twenty-third, nineteen eight from steamship China as wife of native. Inspector Taylor apparently investigated case summer of nineteen ten. Will this information affect Department's decision not to issue warrant.

BACKUS.

ATTEST:

(Sgd.) SAMUEL W. BACKUS,

1032/231

Commissioner.

FHA/LED.

Copy—LED. [30]

[Telegram—September 26, 1912, B. S. Cable, Act.
Sec. to Immigration Service.]

AMB.

1:40 P. M.

18 GOVT.

Sept. 26, 1912.

Imm. Service.

Arrow Lo King, *alias* Choy Gum prognosis relay thirty.

B. S. CABLE,

Act. Sec.

NOTE—The above is telegraphic warrant of arrest.

L. E. D. [31]

Warrant—Arrest of Alien.

UNITED STATES OF AMERICA.
DEPARTMENT OF COMMERCE AND LABOR.
Washington.

No. 53510/212.

To Samuel W. Backus, Commissioner of Immigration, Angel Island Station, San Francisco, California, or to Any Immigrant Inspector in the Service of the United States:

WHEREAS, from evidence submitted to me, it appears that the alien LO KING, *alias* CHOY GUM, who landed at the port of San Francisco, California, ex SS. "China," on the 23d day of October, 1908, has been found in the United States in violation of the Act of Congress approved February 20, 1907, amended by the Act approved March 26, 1910, to wit:

That the said alien is a prostitute and has been found practicing prostitution subsequent to her entry into the United States.

I, Benj. S. Cable, Acting Secretary of Commerce and Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to take into custody the said alien and grant her a hearing to enable her to show cause, why she should not be deported in conformity with law.

The expenses of detention hereunder, if neces-

sary, are authorized payable from the appropriation "Expenses of Regulating Immigration, 1913." Pending disposition of her case the alien [32] may be released from custody upon furnishing satisfactory bond in the sum of \$3,000.00.

For so doing, this shall be your sufficient warrant.

Witness, my hand and seal this 26th day of September, 1912.

(Sgd.) BENJ. S. CABLE,

Acting Secretary of Commerce and Labor.

CEB.

Copy—LED. [33]

[Testimony of Choy Gum.]

DEPARTMENT OF COMMERCE AND LABOR.
IMMIGRATION SERVICE.

No. 1032/231.

Angel Island, Cal., October 10, 1912.

In re LO KING, *alias* CHOY GUM, Arrested by
Virtue of Authority Contained in Warrant of
Arrest No. 53,510/212, Dated September 26,
1912, as One Found Practicing Prostitution
Subsequent to Her Entry into the United
States.

Examining Inspector:

Inspector in Charge, F. H. AINSWORTH.

Interpreter: MISS TAI LEUNG.

Stenographer: H. SCHMOLDT.

PRESENT:

Attorney GEO. A. McGOWAN, Representing Alien.

Alien sworn through interpreter:

Q. What is your name? A. Choy Gum.

Q. Have you any other name?

(Testimony of Choy Gum.)

A. No other name.

Q. When did you arrive in the United States?

A. When I was two years old.

Q. A statement has been made here that you are known as Lo King, who arrived on the SS. "China" October 23, 1908, as the wife of Hum Mow Hing. Is that correct?

A. I don't know anybody by that name.

Q. Did you arrive here on the SS. "China" October 23, 1908?

A. No, I have been here since I was two years old.

Q. Is that not your photograph? (Referring to photograph of Lo King on Certificate of Marriage No. 69.) A. No.

Assistant Commissioner H. EDSELL appears and makes following statement: "The woman now before me was brought to this station some days ago by her attorney wholly for the purpose of identification or of comparison with the photograph in the records of Lo King, admitted at this port on October 23, 1908, ex SS. 'China.' I compared her with said photograph and had no hesitancy in reaching the conclusion that she was the original of the 1032/231 (Lo King *alias* Choy Gum) 10/10/12.

[34] photograph referred to. I held the photograph up so she could see it and pointed to it, and she nodded her head affirmatively, apparently intending to indicate to me that it was her photograph."

Q. I now ask you again if you are not the person that this is a photograph of? (Referring to above-

(Testimony of Choy Gum.)

mentioned photograph.) A. No.

Q. You made a statement the other day before me through another interpreter concerning your presence in the United States and your occupation, etc., and I want to ask you whether that statement was correct or whether you have any changes to make.

A. Yes, I told the interpreter that I was here since I was two years old.

Q. Were all of the statements you made at that time true? A. Yes.

Q. Did you understand the interpreter on that occasion? A. Yes.

(By Inspector in Charge, F. H. AINSWORTH.)

In my judgment, this woman is the one who was admitted as Lo King, wife of a native, Hom King Fook, from the SS. "China," October 23, 1908, and whose photograph is attached to the record. At this point Attorney Geo. A. McGowan, who represents the alien, appears, and will make any statement he wishes to make in behalf of the alien, or ask her any questions he thinks pertinent.

(By Attorney GEO. A. MCGOWAN.)

I have nothing to say except that the matter be continued. That is all.

(By Inspector in Charge, F. H. AINSWORTH.)

Q. How long do you wish to have the matter continued?

(By Attorney MCGOWAN.)

A. I have not received any of the copies of any of the papers in the matter and I could not tell until I saw them.

(Testimony of Choy Gum.)

(By Inspector in Charge, F. H. AINSWORTH.) [35]

1032/231 (Lo King *alias* Choy Gum) 10/10/12.

Mr. McGowan, I hand you herewith a record in the case which has been written up, all except the testimony which has been taken to-day, and while I don't want to be unduly urgent, I think, to-day being October 10th, that, say if the case were continued until October 23d, that is thirteen or fourteen days, that that would give you ample time.

(By Attorney McGOWAN.)

Well, make it October 24th.

(By Inspector in Charge, F. H. AINSWORTH.)

Case is continued until October 24, 1912.

Arraignment: Lo King, *alias* Choy Gum, you are advised that you have been arrested by authority of warrant of arrest No. 53510/212, dated September 26, 1912, issued by the Secretary of the Department of Commerce and Labor, being charged with being a prostitute who has been found practicing prostitution subsequent to your entry into the United States. You will be given an opportunity to examine the records of the case, and to show cause, or to employ counsel to show cause, why you should not be deported from the United States.

Q. Do you wish to employ counsel?

A. I have an attorney already.

(By Inspector in Charge, F. H. AINSWORTH.)

I will state also for your information that a stipulation has been entered into with the bonding company whereby the bond furnished when you were

first arrested will be held valid under the present warrant.

Case deferred until October 24, 1912, in the afternoon, in order to give the alien an opportunity to show cause why she should not be deported.

I certify as to the correctness of the foregoing transcript.

H. SCHMOLDT,
Stenographer. [36]

Exhibit "B" [to Petition for Writ of Habeas Corpus.]

No. 1032/231.

November 7, 1912.

Inspector—F. H. AINSWORTH.

Stenographer—L. E. DINKLAGE.

Attorney—GEO. A. McGOWAN.

[Hearing in Choy Gum Case, Continued.]

(By Inspector AINSWORTH.)

This is a continuation of hearing in the Choy Gum case, under Departmental Warrant No. 53510/212, dated September 26, 1912, charging that said alien is a prostitute and has been found practicing prostitution subsequent to her entry into the United States. Mr. McGowan, what do you wish to introduce at this time?

Attorney McGOWAN.—In compliance with the direction of the Department as stated by you, the defense and evidence to be presented on behalf of this woman will be submitted in the form of affidavits. Preliminary to the production of those affidavits I desire to make certain protests and exceptions.

FIRST—We desire to protest to any *acting* being taken in this case other than the cancelation of bond and the release of the woman, upon the ground that it is shown from the record that she has resided continuously in the United States for more than three years prior to the date of her arrest, which, I believe was the 20th day of September, 1912, and the new warrant issued in this case and from which I assume the case would run, being [37] September 26, 1912; the detained herself claiming that she entered the United States over seventeen years ago, while the Government claims in the matter that she originally entered the United States on October 23, 1908. Whichever of these dates being correct, it would make the residence of the woman in the United States longer, for a greater period than three years prior to her arrest.

SECOND—The second exception which we desire to reserve is the incorporation in the record of the testimony of Wong Go and the testimony of the girl, Tom Yook Lan, upon the ground that the use of the testimony as given is detrimental to the detained and it has prevented the detained from an opportunity for cross-examination, the right of counsel being denied her at the time the testimony was taken. This testimony being detrimental and being taken at a time when counsel was denied the detained, we protest and take exception to the incorporation in this record. I desire to protest against the case being closed without an opportunity being afforded the detained to have counsel cross-examine the witnesses for the Government.

THIRD—We desire to reserve a third protest upon the ground that upon the admitted fact of domicile and residence in this case, this proceeding is in violation of the rights of an alien domiciled in the United States, and in violation of the reason and spirit as well as the letter of the Constitution of the United States. The case which we desire to present [38] on behalf of the detained will consist of three affidavits which will be filed in the City Office this afternoon and they will reach you to-morrow morning.

No. 1032/231.

2.

(Attorney McGOWAN Continues.)

I would like to ask if the Government has anything to offer in this case further than copies of which have already been presented to the detained which consist of the statements of the three girls, Choy Gum, Leong Toe, and Tom Yook Lan, and the Chinese witness, Wong Go.

Inspector AINSWORTH.—There is offered in evidence affidavits of two police officers who made the raid. These are the originals and I understood you had copies.

Attorney McGOWAN.—This is the first I have seen of them. After having inspected the affidavit of Arthur D. Layne, and the affidavit of Dennis Bohle, both of which are under date of the 15th of October, 1912, we desire to protest against the introduction of these affidavits in evidence on the ground that [39] it is evidence presented after the detained was permitted the right of counsel and we

request that an opportunity be afforded for cross-examination of these two witnesses for the Government, and in the event of this being denied we desire to except and protest against the case being closed unless the right of counsel be afforded.

Inspector AINSWORTH.—I will say, Mr. McGowan, in this respect, that the case has been awaiting the alien's showing why she should not be deported since October 10th, and the record was available at all times, and it has been postponed a number of times at the request of alien's attorney. I do not feel justified in holding it open any more and will send the record as it appears to Washington with the protest made by you being part of it.

Attorney McGOWAN.—I desire to say that this knowledge was the first intimation I had that these affidavits were in the record and I believe that the right of cross-examination should be accorded the detained, and I desire to protest at same not being done.

Inspector AINSWORTH.—The instruction under which I am acting is that this hearing is informal and simply that the charge has been made against this alien and she has replied thereto as seemed best to her. The protest or objection regarding the conduct of the case might properly be made in such documentary form as you may deem proper to present for the consideration of the Secretary.

Attorney McGOWAN.—We desire to protest at this limitation upon the right of counsel and this abridgement on the ability of the [40] defendant to properly present a full and adequate defense.

You can send the case to the Department to-morrow because my protest may be considered as a brief in itself and the case will be represented before the Department by Attorneys Stabben & Stewart, Union Truste Building.

I hereby certify to the correctness of the foregoing transcript.

L. E. DINKLAGE,
Stenographer. [41]

[Affidavit of Leung Tan.]

State of California,
City and County of San Francisco,—ss.

LEUNG TAN, being first duly sworn upon oath, according to law, doth depose and say:

That your affiant is a resident Chinese person lawfully domiciled within the United States of America.

That your affiant is the lessee of the building on St. Louis Alley, in the City and County of San Francisco, State of California, from which three Chinese girls alleged to be known as Choy Gum, Leong Toe, and Ton Yook Lan were taken by the immigration authorities on or about the 20th of September, 1912.

Your affiant desires to state that he has not at any time permitted, and would not permit, the use of the building leased by him as aforesaid, for the use or purpose of conducting therein a house of ill-fame or questionable character; and that your affiant has personally inspected the premises so leased by him as aforesaid and feels certain that the said premises were honestly and actually conducted as a rooming-

house, and that the said premises were not operated or conducted as a house of ill-fame, nor was there conducted in said premises a house of ill-repute. That your affiant, from being the lessee of said building and his frequent inspection of the premises themselves, feels confident in making the assertion that there has not been conducted, in said premises, any house of ill-fame or place of questionable character. [42]

LEUNG TAN (Chinese Signature).

Subscribed and sworn to before me this 8th day of November, 1912.

[Notarial Seal] THOMAS S. BURNES,
Notary Public in and for the City and County of
San Francisco, State of California. [43]

[Affidavit of Bow Shee.]

State of California,
City and County of San Francisco,—ss.

BOW SHEE, being first duly sworn upon oath, according to law, doth depose and say:

That she is a resident Chinese person lawfully domiciled within the United States of America, and that she resides at No. 323 Fifth Street, in the City of Oakland, County of Alameda, State of California, and that she was formerly a resident of the City and County of San Francisco, State aforesaid, residing therein as No. 913 Grant Avenue.

That your affiant is personally well acquainted with the Chinese woman charged herein as Choy Gum (*alias* Low King), and that she has been very well acquainted with her for a period of upwards

of three years prior to the date of her arrest, which was on or about the 20th day of September, 1912; and that during all of the acquaintance of your affiant with her, she has always been a resident of the State of California and of the United States of America. *You* affiant has been very intimately acquainted with her and has always known her to be a woman of respectability, and that she has always lived in places occupied by Chinese families of good character. Your affiant further declares that, if the said woman had been following an immoral life or been a member of a house of ill-fame, at any time since her residence in this country, your affiant feels that her acquaintance with her [44] was of such a character that she would have knowledge of this fact, both because of the fact that your affiant saw her very frequently, and also by reason of the acquaintance by your affiant with others who saw her very frequently; and your affiant feels certain that, had she ever followed an immoral occupation, that fact would have been known to your affiant, or that your affiant would have received some information concerning the same.

Therefore, your affiant doth declare upon oath that, to the best of her knowledge, information and belief, as above set forth, the said Chinese woman herein referred to has not, during her acquaintance with affiant, or a period upwards of three years, followed a life of immorality or been guilty of any immoral conduct, or been a member or an inmate of any house of ill-fame; but, on the contrary, she has been a woman of respectability and associated with wo-

men of respectability, and that her character is good.

her

BOW X SHEE.

mark

Witness to mark: THOMAS S. BURNES.

Subscribed and sworn to before me this 8th day of November, 1912.

[Notarial Seal] THOMAS S. BURNES,
Notary Public, in and for the City and County of
San Francisco, State of California. [45]

[Affidavit of Gee Shee.]

State of California,

City and County of San Francisco,—ss.

GEE SHEE, being first duly sworn upon oath, according to law, doth depose and say:

That she is a resident Chinese person lawfully domiciled within the United States of America, at present residing at number 33 Waverly Place, in the City and County of San Francisco, State of California.

That your affiant is personally acquainted with the Chinese woman known as Choy Gum; and who is charged in this proceeding as Low King (*alias* Choy Gum), and your affiant has known her upwards of three years prior to her arrest herein, which was on or about the 20th day of September, 1912. That, during all of the acquaintance of your affiant with the said woman, she has been a resident of the State of California, United States of America; and that during all of said time your affiant has known her as a woman of respectability and good character, and

has never known or heard of her having, at any time, followed a life of immorality or been an inmate of a house of ill-fame; and your affiant having associated with her during all of the time before set forth at very frequent intervals, your affiant feels that the said Chinese woman could not have had an immoral character or followed a life of immorality without the same having become known to your affiant. [46]

That your affiant has frequently seen the said Choy Gum, and has associated with her almost continuously during all of the time hereinabove set forth, and has always known her personally as a woman of good character and respectability, and has never heard her spoken of in any other way than as a woman of good character. And your affiant further doth depose and say that the intimacy of the acquaintanceship existing between your affiant and the said Choy Gum was of such a character, that had the said Choy Gum been leading a life of immorality or conducting any acts of immorality, the same would undoubtedly have become known to your affiant. Therefore, doth your affiant declare that the said Choy Gum is a woman of good character, both from facts within the knowledge of your affiant and on account of the high reputation of the said Choy Gum, she, the said Choy Gum, always associating with women of good character.

her

GEE

SHEE,

mark

Witness to mark: THOMAS S. BURNES.

Subscribed and sworn to before me, this 8th day of November, 1912.

[Notarial Seal] THOMAS S. BURNES,
Notary Public in and for the City and County of San
Francisco, State of California. [47]

[Affidavits of Toy On and Ma Sing.]

State of California,

City and County of San Francisco,—ss.

TOY ON and MA SING, being duly and severally sworn, each for himself and not one for the other, do individually and separately depose and say:

That your affiant is a resident Chinese person lawfully domiciled within the United States of America.

That your affiant is personally acquainted with Choy Gum, a Chinese woman arrested on or about the 20th day of September, 1912, at No. 5 St. Louis Alley, in the City and County of San Francisco, State of California. That the said Choy Gum is now about twenty-one years of age, and that she has been personally known to your affiant continuously since she, the said Choy Gum, was a child. That, during all of the acquaintance of your affiant with the said Choy Gum, she has always been a resident of the State of California and the United States of America. Your affiant has been very well acquainted with her during all of her childhood and since she has attained her womanhood; and that, during all of these times, your affiant has known her to be a person of respectability, and that she has always lived in places occupied by Chinese families of good character.

Your affiant further declares that, if the said Choy Gum had, at any time, been following an immoral life, or if she had, at any time, been a member of a house of ill-fame, your affiant feels positive that his acquaintance with her is of such a character that he would have knowledge of that fact, both by reason of the fact that your affiant saw her very frequently [48] during all of said times, and also by reason of the acquaintance of your affiant with others who saw her at frequent intervals; and your affiant feels certain that, had the said Choy Gum ever followed an immoral occupation, that fact would have been known to your affiant, or that your affiant would have received some knowledge concerning the same. Therefore, your affiant doth declare upon oath that, to the best of his knowledge, information and belief, as above set forth, the said Choy Gum has not, during the acquaintance of your affiant with her, followed a life of immorality or been guilty of immoral conduct or been a member or an inmate of a house of ill-fame; but on the contrary, she has been a person of respectability, and has always associated with people of respectability, and that her character is good.

Your affiant doth further declare that up-stairs portion of the house at No. 5 St. Louis Alley in the City and County of San Francisco, State of California, is not a house of ill-fame, but is a Chinese lodging or rooming house, which has not been used for immoral purposes.

TOY ON (Chinese signature).

MA SING (Chinese signature).

Subscribed and sworn to before me this 8th day of November, 1912.

[Notarial Seal] THOMAS S. BURNES,
Notary Public in and for the City and County of San
Francisco, State of California. [49]

[Affidavit of Arthur D. Layne.]

DEPARTMENT OF COMMERCE AND LABOR.
Immigration Service.

10/32/230-231.

Office of the Commissioner,
Angel Island Station,
via Ferry Postoffice,
San Francisco, Cal.

ARTHUR D. LAYNE, who being first duly sworn, on oath, declares, and deposes and says, that he is a police officer attached to the regular Police Department of the City and County of San Francisco, State of California, holding the rank of Sergeant thereof; that he has been detailed in that portion of the City and County of San Francisco commonly called Chinatown at various times during the past four years; that in said Chinatown is situated #5 St. Louis Alley, the premises here in question; that he knows the general reputation of the said premises situated at #5 St. Louis Alley; that the premises #5 St. Louis Alley has the general reputation in Chinatown of being a house of prostitution and was such on the 20th day of September, 1912.

That prior to September 20, 1912, this affiant received information that certain alien women were being held at #5 St. Louis Alley, a reputed house of prostitution, and acting in accordance with this in-

formation this affiant visited the said premises on the said date and after gaining an entrance to the said premises found CHOY GUM and LEONG TOE, the defendants in this action, in said premises in an endeavor to escape to the roof by means of a ladder.

(Sgd.) ARTHUR D. LAYNE.

Subscribed and sworn to before me, this 15 day of October, 1912.

(Sgd.) W. M. GASSAWAY,
Chinese and Immigrant Inspector.

Copy-LED-11/9/12. [50]

[Affidavit of Dennis Bohle.]

DEPARTMENT OF COMMERCE AND LABOR.
Immigration Service.

10/32/230-231.

Office of the Commissioner,
Angel Island Station,
via Ferry Postoffice,
San Francisco, Cal.

DENNIS BOHLE, who being first duly sworn, on oath, declares, deposes, and say, that he is a police officer attached to the regular Police Department of the City and County of San Francisco, State of California; that he has been detailed as such police officer in that section of the City and County of San Francisco known as Chinatown most all the time during the past two years; that he knows the general reputation of the premises situated at #5 St. Louis Alley in said city; that he knows the general reputation of the premises #5 St. Louis Alley to be a

house of prostitution, and was such on the 20th day of September, 1912.

This affiant acting in obedience to orders visited the said premises on the said 20th day of September, 1912, in company with Sergeant Layne and assisted in arresting two Chinese alien women in said house of prostitution situated at #5 St. Louis Alley; at the time of the arrest of the said alien women named Choy Gum and Leong Toe, they were in the said house of prostitution making an endeavor to escape to the roof.

(Sgd.) DENNIS BOHLE.

Subscribed and sworn to before me, this 15 day of October, 1912.

(Sgd.) W. M. GASSAWAY,
Chinese and Immigrant Inspector.

Copy-LED. [51]

Warrant—Deportation of Alien.

UNITED STATES OF AMERICA,
DEPARTMENT OF COMMERCE AND LABOR.
Washington.

No. 53510/212.

To SAMUEL W. BACKUS, Commissioner of Immigration, Angel Island Station, San Francisco, California.

WHEREAS, from proofs submitted to me, after due hearing before Immigrant Inspector F. H. Ainsworth, held at Angel Island, California, I have become satisfied that the alien, CHOY GUM, *alias* LO KING, who landed at the port of San Francisco, Cal., ex SS. "China," on the 23d day of October,

1908, has been found in the United States in violation of the Act of Congress approved February 20, 1907, amended by the Act approved March 26, 1910, to wit:

That the said alien is a prostitute and has been found an inmate of a house of prostitution and practicing prostitution subsequent to her entry into the United States, and may be deported in accordance therewith:

I, BENJ. S. CABLE, Acting Secretary of Commerce and Labor, by virtue of the power and authority vested in me by the [52] laws of the United States, do hereby command you to return the said alien to China, the country whence she came, at the expense of the appropriation, "Expenses of Regulating Immigration, 1913."

You are directed to purchase transportation for the alien from San Francisco, Cal., to her home in China, at the lowest steerage rate, obtainable, the cost thereof being chargeable to the above-named appropriation.

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 15th day of November, 1912.

(Sgd.) BENJ. S. CABLE,
Acting Secretary of Commerce and Labor.

WW

Copy-LED.

[Endorsed]: Filed Apr. 16, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [53]

[Minutes of Court—April 16, 1914—Order to Show Cause.]

(MINUTES—ORDER TO SHOW CAUSE ON PETITION FOR WRIT.)

At a stated term of the District Court of the United States for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, State of California, on Thursday, the 16th day of April, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

No. 15,641.

In the Matter of CHOY GUM, on Habeas Corpus.

In this matter Geo. A. McGowan, Esq., presented to the Court the petition of Wong Shee for a writ of habeas corpus for and on behalf of Choy Gum. After considering said petition, the Court ordered that Samuel W. Backus, Esq., do appear and show cause on April 28th, 1914, at 10 o'clock A. M., why a writ of habeas corpus should not issue herein as prayed for in said petition. Further ordered that a copy of this order with said petition be served upon said Commissioner and that he retain the said Choy Gum within his custody and within the jurisdiction of this Court until the further order of this Court.

[54]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

No. 15,641.

In the Matter of CHOY GUM, *alias* LO KING, on
Habeas Corpus.

Demurrer to Petition for Writ of Habeas Corpus.

Now comes the respondent, Samuel W. Backus, Commissioner of Immigration at the port of San Francisco, and demurs to the petition on file herein on the following grounds:

I.

That said petition does not state facts sufficient to entitle petitioner to the issuance of a writ of habeas corpus or any relief thereon.

II.

That said petition is insufficient in that the statements in the petition relative to the record of the testimony taken on the hearing for the order of deportation of the applicant are statements of conclusions of law.

WHEREFORE, respondent prays that the writ of habeas corpus be denied.

JOHN W. PRESTON,

United States Attorney,

WALTER E. HETTMAN,

Asst. United States Attorney,

Attorneys for Respondent.

[Endorsed]: Filed Jun. 27, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [55]

**Opinion and Order Sustaining Demurrer to Petition
for Writ of Habeas Corpus and Denying the
Petition.**

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

No. 15,641.

In the Matter of CHOY GUM, Sometimes Referred
to as LO KING, on Habeas Corpus.

GEORGE A. MCGOWAN, Esq., Attorney for
Petitioner.

JOHN W. PRESTON, Esq., U. S. Atty., and
WALTER E. HETTMAN, Esq., Asst. U. S.
Atty., Attorneys for Respondent.

**ON DEMURRER TO PETITION FOR WRIT
OF HABEAS CORPUS.**

The petition avers that on November 7th, the last day of the hearing, two affidavits of police officers were presented against petitioner, which affidavits were taken on October 15th, and that petitioner by her counsel requested an opportunity to cross-examine the said officers, as also an opportunity to meet the evidence contained in such affidavits, which requests were denied and the hearing immediately closed. As to the first request, it has been held that evidence may be presented in the form of affidavits, and in such case I am of the opinion that the right to cross-examine does not exist. The second request, that is for an opportunity to meet the evidence presented unexpectedly to petitioner on the last day of

the hearing, although averred in the petition, does not appear from the [56] record attached to have been made. The only request shown by the record was a request for an opportunity to cross-examine, no request for a continuance, or indeed for anything else having been made. As to these specifications of unfairness I am of the opinion that they are without legal merit. Nor do I think that the incorporation in the record of testimony taken in other proceedings constitutes unfairness under the law where, as here, the petitioner has been afforded, an opportunity to meet it. It is averred on information and belief that after the close of the case the Inspector submitted evidence detrimental to petitioner which she has never seen. If this be true, of course the hearing was unfair. But in proceedings like this, an averment of this nature is easily made, and I am not disposed to give it any attention, unless the reason for the belief, and the nature and source of the information is set out, so that the Court may say whether there is any reasonable ground for the belief, or any basis for the information. These views dispose of the contentions made by petitioner, and it is therefore ordered that the demurrer to the petition be sustained, and the petition denied.

July 1st, 1914.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Jul. 1, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [57]

*In the District Court of the United States, in and
for the Northern District of California, Division
No. 1.*

No. 15,641.

In the Matter of CHOY GUM, Sometimes Referred
to as LO KING, on Habeas Corpus.

Petition for Appeal.

Now comes Choy Gum, sometimes known as Lo King, the petitioner and the detained, and the appellant herein, and say:

That, on the 1st day of July, 1914, the above-entitled court made and entered its order denying the petition for a writ of *habeas*, as prayed for, on file herein, in which said order in the above-entitled cause certain errors were made to the prejudice of the appellant herein, all of which will more fully appear from the assignment of errors filed herewith.

WHEREFORE, this appellant prays that an appeal may be granted in her behalf to the Circuit Court of Appeals of the United States, for the Ninth Circuit thereof, for the correction of the errors so complained of, and further, that a transcript of the record, proceedings and papers in the above-entitled cause, as shown by the praecipe, duly authenticated, may be sent and transmitted to the said United States Circuit Court of Appeals, for the Ninth Circuit thereof.

Dated at San Francisco, California, July 11th, 1914.

GEO. A. MCGOWAN,

Attorney for Petitioner and Detained and Appellant
Herein.

Service of the within Petition for Appeal and receipt of a copy thereof is hereby admitted this 11th day of July, 1914.

J. W. PRESTON,
U. S. Attorney.

[Endorsed]: Filed Jul. 11, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [58]

In the District Court of the United States, in and for the Northern District of California, Division No. 1.

No. 15,641.

In the Matter of CHOY GUM, Sometimes Referred to as LO KING, on Habeas Corpus.

Assignment of Errors.

Comes now, Choy Gum, sometimes referred to as Lo King, the appellant herein, by *their* attorney, George A. McGowan, Esquire, in connection with her petition, for an appeal herein, *assign* the following errors, which she avers occurred upon the trial or hearing of the above-entitled cause, and upon which she will rely, upon appeal to the Circuit Court of Appeals, for the Ninth Circuit, to wit:

First: That the Court erred in sustaining the demurrer and in denying the petition for a writ of habeas corpus, herein.

Second: The Court erred, in holding that it had no jurisdiction to issue a writ of habeas corpus, as prayed for in the petition herein.

Third: That the Court erred in not holding that the allegations contained in the petition herein, for a

writ of habeas corpus, were sufficient in law, to justify the granting and issuing of a writ of habeas corpus, as prayed for, in said petition.

Fourth: That the Court erred in holding that it was not an abuse of discretion by the immigration authorities, and did not deprive the alien, the petitioner herein, of a fair [59] hearing, to incorporate in the record against the said alien the testimony of Leong Toe, Ton Yook Lan and Wong Go, which said witnesses had been sworn to tell the truth touching the legality of their own residence in the United States, and not the legality of the residence of this alien, the petitioner herein; and who were self-interested witnesses, seeking self-protection and liberation, and who, under promise and hope of immunity, testified to the detriment of the petitioner; and in refusing to set a time and place for the examination of the said witnesses upon behalf of the petitioner herein, as more fully contained in the first specification of unfairness contained in the petition on file herein.

Fifth: That the Court erred in holding that it was not an abuse of discretion by the immigration authorities, and did not deprive the alien, the petitioner herein, of a fair hearing, to conduct for the Government a hearing, and take the testimony of Arthur T. Layne and Dennis Bohle, against the petitioner, without notice to either the petitioner, or her attorney, and in their absence embody the said testimony in the form of affidavits, and thus deprive the petitioner of any opportunity to answer the same, or test the knowledge or credibility of the said wit-

nesses; and in withholding the fact that said testimony had been so taken until the final hearing in the said matter, and then not afford the petitioner any opportunity to answer the said evidence, all as more particularly alleged in the second specification of unfairness contained in the petition on file herein.

Sixth: The Court erred, in holding that it was not an abuse of discretion, and did not deprive the alien of a fair hearing, for the Commissioner of Immigration, after the close of [60] the Government case against the said alien, the petitioner herein, to submit evidence to the department detrimental to the said alien, the said petitioner herein, which said detrimental evidence had been previously withheld from the said alien, the petitioner herein, and no opportunity at all afforded her at any time of meeting, or answering, the said evidence, which was clandestinely forwarded to the Secretary of Labor, and in so abridging and limiting the right of the counsel of the alien, as to prevent counsel from ascertaining all the evidence submitted against the said alien, the petitioner herein; all as more particularly alleged in the third specification of unfairness contained in the petition on file herein.

Seventh: The Court erred in holding that it was not an abuse of discretion, and did not deprive the alien, the petitioner herein, of a fair hearing for the immigration authorities to submit their evidence against the alien, the petitioner herein, in the form of oral examinations from the witnesses prior to according the alien the right of an attorney and to thereafter present the evidence from the Govern-

ment witnesses in the form of *ex parte* affidavits, thus preventing and depriving the alien, the petitioner herein, of any opportunity of being confronted with any witnesses being presented against her, and depriving her of any and all opportunity to submit evidence of said Government witnesses upon her own behalf; all as more particularly alleged in the fourth specification of unfairness contained in the petition on file herein.

WHEREFORE, the appellants pray that the judgment and order of the United States District Court, in and for the [61] Northern District of the State of California, made and entered herein in the office of the Clerk of the said Court on the first day of July, 1914, sustaining the demurrer and discharging the order to show cause and dismissing the petition for a writ of habeas corpus be reversed and that this cause be remitted to the said lower court, with instructions to discharge the said Choy Gum, sometimes known as Lo King, from custody, or grant her a new trial before the lower court, by directing the issuance of writ of habeas corpus, as prayed for in said petition.

Dated San Francisco, California, July 11th, 1914.

GEO. A. MCGOWAN,

Attorney for Applicant.

Service of the within Assignment of Errors and receipt of a copy thereof is hereby admitted this 11th day of July, 1914.

J. W. PRESTON,

U. S. Attorney.

[Endorsed]: Filed Jul. 11, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [62]

*In the District Court of the United States, in and
for the Northern District of California, Division
No. 1.*

No. 15,641.

In the Matter of CHOY GUM, Sometimes Referred
to as LO KING, on Habeas Corpus.

Order Allowing Petition for Appeal.

On this 4th day of August, A. D. 1914, came Choy Gum, sometimes known as Lo King, the petitioner and the detained, herein, by her attorney, George A. McGowan, Esquire, and having previously filed herein, did present to this Court, her petition praying for the allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, intended to be urged and prosecuted by her, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein, was rendered, duly authenticated, may be sent and transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had in the premises as may seem proper.

ON CONSIDERATION WHEREOF, the Court hereby allows the appeal hereby prayed for, and orders execution and remand stayed pending the hearing of the said case in the said United States Circuit Court of Appeals for the Ninth Circuit; and it is further ordered, after hearing counsel for the peti-

tioner and for the Government thereon, that the said detained may remain at large upon the bond previously given before this Court in this matter, during the pendency of the appeal taken herein from said judgment; provided said appeal be docketed in the Circuit Court of Appeals at its October term and that she do not depart from the jurisdiction of this Court, but remain and abide by whatever judgment shall finally be entered herein.

Dated at San Francisco, California, August 4th, 1914.

M. T. DOOLING,
United States District Judge.

Service of the within order allowing appeal and receipt of a copy thereof, is hereby admitted this 4th day of August, A. D. 1914.

WALTER E. HETTMAN,
Asst. United States District Attorney.

[Endorsed]: Filed Aug. 4, 1914. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy Clerk. [63]

*In the District Court of the United States, in and
for the Northern District of California, Division
No. 1.*

No. 15,641.

In the Matter of CHOY GUM, Sometimes Referred
to as LO KING, on Habeas Corpus.

Notice of Appeal.

To the Clerk of the Above-entitled Court and to the
Hon. John W. Preston, United States Attorney
for the Northern District of California:

You and each of you, will please take notice that Choy Gum, sometimes known as Lo King, the petitioner and the detained, above named, does hereby appeal to the Circuit Court of Appeals of the United States, for the Ninth Circuit thereof, from the order made and entered herein on the 1st day of July, 1914, denying the petition for a writ of habeas corpus filed herein.

Dated at San Francisco, California, July 11th, 1914.

GEO. A. McGOWAN,

Attorney for Petitioner and Detained and Appellant.

Service of the within Notice of Appeal and receipt of a copy thereof is hereby admitted this 11th day of July, 1914.

J. W. PRESTON,

U. S. Attorney.

[Endorsed]: Filed Jul. 11, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [64]

Citation on Appeal—Copy.

UNITED STATES OF AMERICA,—ss.

To President of the United States, to Hon. SAMUEL W. BACKUS, Commissioner of Immigration, Port of San Francisco, and to His Attorney, JOHN W. PRESTON, United States Attorney, in and for the Northern District of California, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals

for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the Northern District of California, Division No. 1 thereof, wherein Choy Gum, sometimes referred to as Lo King, is appellant, *appellant*, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable MAURICE T. DOOLING, United States District Judge for the Northern District of California, this 10 day of August, A. D. 1914.

M. T. DOOLING,
United States District Judge. [65]

Service of the within Citation on Appeal and receipt of a copy thereof is hereby admitted this 10th day of Aug., 1914.

WALTER E. HETTMAN,
Asst. U. S. Atty.

[Endorsed]: Filed Aug. 10, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [66]

Bond on Appeal.

ILLINOIS SURETY COMPANY. 4018.

KNOW ALL MEN BY THESE PRESENTS,
That we, Choy Gum, *alias* Lo King, as principal,

and Illinois Surety Company, as sureties, are held and firmly bound unto the United States of America in the full and just sum of Five hundred (500) dollars, to be paid to the said United States of America *certain* attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 21st day of August in the year of our Lord one thousand nine hundred and fourteen.

WHEREAS, lately at a District Court of the United States for the Northern District of California, First Division, in a matter pending in said Court, for a writ of habeas corpus an order was entered against the said Choy Gum, *alias* Lo King, sustaining a demurrer to her petition for a writ of habeas corpus and denying the petition for the writ, and she having obtained from said Court an order allowing an appeal to reverse the said order in the aforesaid matter, and a citation directed to the respondent citing and admonishing him to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That if the said Choy Gum, *alias* Lo King, shall prosecute said appeal to effect, and answer all damages and costs if she fail to make her plea good, then the above obligation to

be void; else to [67] remain in full force and virtue.

CHOY (Cross) GUM *alias* LO KING.

(Seal)

ILLINOIS SURETY COMPANY. (Seal)

By HAROLD M. PARSONS, (Seal)

Its Attorney in Fact.

Acknowledged before me the day and year first above written.

[Seal]

FRANCIS KRULL.

[Endorsed]: Filed Aug. 25, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [68]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

I, W. B. Maling, Clerk of the District Court of the United States of America for the Northern District of California, do hereby certify that the foregoing 68 pages, numbered from 1 to 68, inclusive, contain a full, true and correct Transcript of certain records and proceedings, in the matter of Choy Gum, sometimes referred to as Lo King, on habeas corpus, No. 15,641, as the same now remain on file and of record in the office of the Clerk of said District Court; said Transcript having been prepared pursuant to and in accordance with the "Praeceptum for Transcript on Appeal" (copy of which is embodied in this Transcript), and the instructions of Geo. A. McGowan, Esquire, Attorney for Petitioner and Appellant herein.

I further certify that the costs for preparing and

certifying the foregoing Transcript on Appeal is the sum of Thirty-two Dollars and Seventy Cents (\$32.70), and that the same has been paid to me by the attorney for the appellant herein.

Annexed hereto is the Original Citation on Appeal issued herein (paged 70 and 71).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 28 day of August, A. D. 1914.

[Seal]

W. B. MALING,

Clerk.

By C. W. Calbreath,

Deputy Clerk. [69]

Citation on Appeal—(Original).

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Hon. SAMUEL W. BACKUS, Commissioner of Immigration, Port of San Francisco, and to His Attorney, JOHN W. PRESTON, United States Attorney, in and for the Northern District of California, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, Division No. 1 thereof, wherein Choy Gum, sometimes referred to as Lo

King, is appellant, *appellant*, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable MAURICE T. DOOLING, United States District Judge, for the Northern District of California, this 10 day of August, A. D. 1914.

M. T. DOOLING,
United States District Judge. [70]

Service of the within Citation on Appeal and receipt of a copy thereof is hereby admitted the 10th day of Aug., 1914.

WALTER E. HETTMAN,
Asst. U. S. Atty.

[Endorsed]: No. 15,641. United States District Court for the Northern District of California, Choy Gum, Sometimes Referred to as Lo King, Appellant, vs. Samuel W. Backus, Commissioner of Immigration, Appellee. Citation on Appeal. Filed Aug. 10, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [71]

[Endorsed]: No. 2475. United States Circuit Court of Appeals for the Ninth Circuit. Choy Gum, Sometimes Referred to as Lo King, Appellant, vs. Samuel W. Backus, as Commissioner of Immigration at the Port of San Francisco, Appellee. Tran-

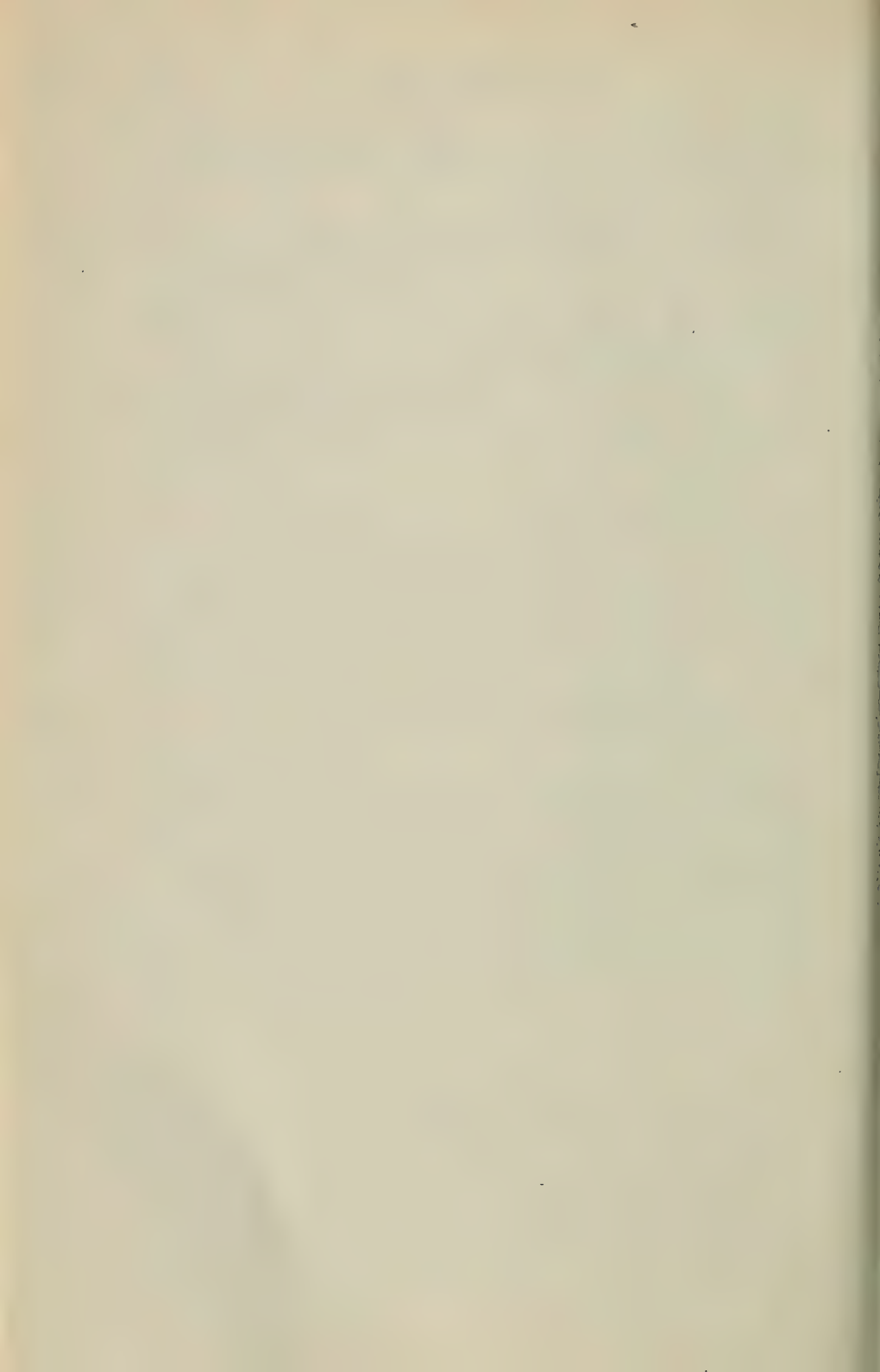
script of Record. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Received and filed September 5, 1914.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.



2
No. 2475

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHOY GUM, sometimes referred to as
Lo King,

Appellant,

vs.

SAMUEL W. BACKUS, as Commissioner
of Immigration at the Port of San
Francisco,

Appellee.

BRIEF FOR APPELLANT.

GEO. A. MCGOWAN,

Attorney for Appellant.

Filed this.....*day of November, 1914.*

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Statement of the Case.

This case comes before this Honorable Court upon appeal from the decision of the United States District Court for the Northern District of California in refusing to issue a writ of habeas corpus and sustaining the demurrer interposed by the respondent (the appellee herein) to a petition for a writ of habeas corpus upon behalf of Choy Gum, sometimes referred to as Lo King, the appellant herein, in which it was sought to prevent her deportation as

an undesirable alien. The facts of the case will be set forth and thereafter will be recited the statutory authority for such executive deportation proceedings, and also those portions of the regulations under which such hearings are held in so far as the same have any bearing on this proceeding.

This appellant was one of a number of occupants of a Chinese rooming house at No. 5 St. Louis alley, in the City and County of San Francisco, State of California, when near midnight of September 19th, or the early morning of September 20, 1912, certain immigration officials and different members of the police force of the City and County of San Francisco, with great force and violence, hammered and broke their way into the said premises and found therein quite a large number of Chinese men and women, and of the people so found three Chinese women, of which this appellant was one, and a Chinaman by the name of Wong Go, were taken into custody, placed in the city prison over night, and on the following morning taken in a taxicab to the Angel Island ferry, and thence removed to the Immigration Station at Angel Island where each of the four persons were examined by Immigration Inspector-in-charge F. H. Ainsworth, who was a member of the party making the arrest hereinbefore mentioned. Choy Gum, this appellant, being sworn to tell the truth in her own matter, testified in substance as follows:

“My name is Choy Gum. I have no other name. I am 21 years old. My father is Choy Keung. He has no other name. My mother

is Fung Shee. My father's village (in China) is Lai Lung (Leung). My father is now in the United States, and my father died when I was a little girl. (Tran. 13.) My mother always resided in that village before she came to the United States. She was there when I was a little girl. My mother died long ago in the United States when I was a little girl. She came with me to the United States when I was two years old. I was born in that village in China, and I came to the United States nineteen years ago. I do not remember the steamer. My father came with us at that time. My father is now at Isleton, and I saw him there a little over a month ago. I was engaged to a man once, and he died, and I have not married. I do not follow any particular life. Sometimes I come out from the country, and I stay there.

Q. This place where you were found this morning is a well known house of prostitution. (Tran. 14.) How long have you been living there?

A. I did not know it. I have been staying there for the last two days.

I went there with a woman. I know this woman pretty well, but I did not arrange as to how much I should pay. She was an old lady. I just called her Ah Moo, meaning aunt. I do not know where she is now. That was not the woman who was in the house this morning. I did not investigate, and I do not know if she is the woman who keeps that house. I do not know if she is the landlady. I did not investigate. I ate last night at her place, but yesterday I ate at another place. I heard a noise outside of people trying to break in. People ran, and I just followed them. No no directed us, but I just followed. I saw the people going that way, so I just followed." (Tran. 15.)

Leong Toe, another Chinese woman taken into custody at the same time, was also examined by the same Inspector, and in the same manner, she being sworn to tell the truth in her own matter. She testified in substance as follows:

“I am Leong Toe. I have no other name. I am 23 years old. My father’s name is Leong Gum. He has no other name. I do not know my mother’s name. She died when I was a little girl. She died in China. She had always lived in her home village. My father is in Hongkong, and has never been in the United States. (Tran. 16.) I came to the United States S. T. 1st year, second month on the ‘Chiyo Maru’, as the wife of Low Shee Yow. He is now in the country. The last I saw of him was a little over a year ago. I do not live in that place where I was arrested. I live at 773 Pacific Street.

Q. I want to know how long you have been staying at this house of prostitution where you were arrested this morning?

A. I went there to visit about seven o’clock last night, and I talked to my friend until it was very late, and I decided to stay there for the night, until the officers came in and broke the door.

I do not know the name of the friend that I went to visit. People call her Ah So (meaning a madam). She was not brought over here this morning. She works there at that house. She was there this morning when I was arrested. It is not a fact that I have been practicing prostitution in that house.” (Tran. 17.)

Ton Yook Lan, another Chinese woman taken into custody at the same time, was also examined by the same Inspector, and in the same manner, she

being sworn to tell the truth in her own matter. She testified in substance as follows:

"My name is Ton Yook Lan. I have no other names. I am 16 years old. My father is Tom Bock. He has no other names. My mother is Hor Shee. She is dead. She brought me here from China last year, and then (Tran. 18) she went back herself and died. I do not remember the steamer, but it arrived about a month before Chinese New Year. The steamer had one black smokestack. Just my mother and myself came on the steamer. I have two brothers and one sister here. I was landed once before. I went back to China when I was seven years old. I do not mean I was landed once before—I went back to China when I was seven years old, and I come back here when I was fifteen years old. My mother went back to China when I did with my brothers and sister. My father died before I went back to China. While there we lived in the See Jee Tow village. My mother always lived there. I was born in San Francisco in the store of Quong Qing Tai—my father was in business. (Tran. 19.)

Q. How long have you been living in this house of prostitution?

A. I went there day before yesterday from Stockton—my brother took me there to study English and it being too hot I just came down here for a change of air.

Q. You know this is a house of prostitution?

A. People told me it was a ladies' boarding-house kept by Ah Gum.

Q. Was that the lady you saw there this morning?

A. Yes, that is my godmother.

I do not know where she was born. She is not really my godmother. I just called her that. Yes, the other girls there had men in their rooms overnight.

Q. This man that was in there told me that he spent the night with one of those girls; do you know anything about that?

A. I don't know about that—I didn't see him in her room but I saw him coming out of an adjoining room.

None of those men made any advances to me while I was there. I did not know that that place had the reputation of an immoral house. I only stayed there a few nights, that is all. I did not pay any board to Ah Gum. She wanted to be my godmother, and I (Tran. 20) don't have to pay her anything. I was staying in a rooming house in Stockton. That place was occupied by a few boy students. There are no other women. The street is next to the street where Chinatown is. The number of the house is 14, but I do not know the name of the street. My brother's name is Ton Bing Lan. He is working in the Quong Tak store until he got a telegram that my mother is dead, and he went back. I did not mean to tell you that my brother brought me to the house the night before. I meant nobody took me there to the house. The fat lady invited me to the house. I have not had sexual intercourse with any man. I lost my virginity in China. I have not had any intercourse with any man since I came to this country." (Tran. 21.)

Wong Go, a Chinese man taken into custody at the same time, was also examined by the same Inspector, and in the same manner, he being sworn to tell the truth in his own matter. He testified in substance as follows:

"My name is Wong Go. I have no other name. I am 24 years old. My father's name is Wong Suey San. He is also named Wong Foo. He has no other names. He is a mer-

chant of Sin Fook Chong, Stockton, at the corner of Washington street and another street, the name of which I do not remember. (Tran. 22.) I have forgotten my mother's name. I have heard it, but I do not remember it. My mother is in China. My father has also returned to China. He is in the Lung Fat village in the H. S. district. That has always been the village of his residence, and that of my mother also. My father has only left that village to come to the United States, and my mother has always lived in that village, and has never been away from it on any pretext. My father has only had one wife. I have one younger brother, and no sisters. I do not know this brother's name as I left China before he was born. (Tran. 23.) I left China and arrived here K. S. 28, 10th month (November, 1902). I am staying at my father's store in Stockton. I was not arrested in Stockton. I came up from there. My father still has an interest in this store in Stockton, and he expects to return to the United States. I do not remember what year he went to China. It was about three or four years ago. I think my mother was living in China when I left there, but I forgot suddenly what I called her ten years ago. She had bound feet. I get my living and my income to live on from the store where my father has an interest. I do not know how much interest my father has got in that store. I receive an income of a little over \$300.00 a year, that is my only source of income. (Tran. 24.) I do not know how much my father receives besides what I got. The manager attends to it. The manager's name is Wong Suey Sing. I am general helper in the business in that store in Stockton. Sometimes I do a little delivery. Sometimes I sell things. Yes, I receive pay for my services, a little over \$300.00 a year salary. My father gave me

\$500.00 or \$1000.00 interest, I do not remember which. I do not receive any income from the store from my father's investment. The three hundred dollars a year which I receive from the store is in return for my services. I am not married, and have never been married. I have never returned to China since I came here. I have made no trips. I left Stockton this time four or five months ago. (Tran. 25.) I have always lived in San Francisco ever since during that period. For my living during the four or five months that I have been in San Francisco I sent the money from Sun Fook Chong." Hearing adjourned.

Hearing resumed later with a change of interpreters.

"My source of income while in San Francisco was that I saved money from raising potatoes and speculation. I did not raise potatoes myself, but I invested some money about four years ago. No, I do not mean that I have leased or owned a piece of land upon which potatoes are raised, but I invested some money with some people who have land. Hong Ah Lung is one of them. He is a farmer in Stockton. I invested in this potato enterprise \$600.00. (Tran. 26.) I obtained this \$600.00 by borrowing some of it, and some I had saved up.

With respect to the house in which I was arrested this morning, I did not live there, but I just visited there. I room on Jackson street above the store of Tai Seng. I do not know the number. I am a stranger in San Francisco. It is on Jackson street above that store. I went to visit in this house where I was arrested a certain man, but I do not know his name. Yes, I was with three girls trying to escape.

Q. Is it not a fact that you went to visit one of those girls?

A. I intended to have a feast up there in that place.

I was going to have a feast, but I did not have it. None of those girls were going to join me. I did not intend to visit those girls at all. I expected to meet a friend there. His name is Ah Gum. He was one of the men arrested and released afterwards. (Tran. 27.) He is the only one in that house that I know. I do not know the number of the room I occupied in that house last night. It was a vacant room. I do not know who owns that rooming house. I did not have to pay any rent. I went there to visit a friend. I do not know whether my friend paid for my lodging or not.

INSPECTOR'S NOTE: The woman who keeps the house is known as Ah Gum.

I never visited that house before last night.

Q. What was your purpose in trying to escape if you were simply to visit a friend?

A. I was a stranger in town and I heard a noise—people trying to break in—and I thought some of the tong men were trying to get me.

Q. Why should they try to get you?

A. I was afraid that they would make a mistake and hurt me.

I do not know the names of the girls who came down in the taxicab with me. (Tran. 28.) I have never seen any of them before. I heard the noise of people trying to break in and the girls trying to run away, and I followed them. As to why I followed the girls instead of the men when I was visiting my friend, I have to say that I thought that there was a fight going on, and I was a stranger in town. I just followed the girls. It is not a fact that I occupied a room that night with a

woman in that building. I am going to stand on that statement.

Q. And you won't change this statement if I bring evidence you occupied a room with a woman?

A. Yes; I slept with a woman last night. I do not know her name. It is one of these three. I cannot recognize her. It is one of the three that came down with me. I did not pay her for sleeping there all night. I do not know who paid.

Q. Do you mean to say that you walked into a house and walked into a room where a woman was and occupied the room with her and did not pay her (Tran. 29) anything? Why don't you tell the truth?

A. She did not sleep in the same room with me. I have no additional statement to make. I have never been arrested by the local authorities for any misdemeanor or crime. (Three Chinese girls brought in.)

Q. Which one of these three girls did you sleep with?

A. The one sitting down.

Q. (To Chinese girl indicated.) What is your name?

A. Choy Gum.

Q. And is this the man who slept with you last night?

A. No, he slept in the room next to mine.

A. No.

(Wong Go answers 'No' at the same time.)"

Thereafter Wong Go, this young man from Stockton who had been landed as a merchant's minor son, and whose father shortly thereafter went to China upon a visit, from which he has not returned, and which merchant's minor son was laboring at a salary since his entry into the United

States, and which facts presented a case which was then similar to many that the government was prosecuting for being illegally in the United States, was, notwithstanding this, released from custody; and Ton Yook Lan, this young girl likewise from Stockton who had shortly before been landed as native of this country, and whose mother had also immediately thereafter gone back to China, and died leaving her daughter behind her in this country, was also discharged from custody, notwithstanding the fact that many Chinese women arrested under similar circumstances who had claimed nativity had been subject to prosecution to prove their nativity or respectability. The fact is indeed significant that both this young man and young woman were from Stockton, found in the same place and each admitting that they had gone to visit a person by the same name, Ah Gum. On releasing these two persons from custody, the Immigration official thereupon and upon the 20th day of September sent a telegraphic application for warrants of arrest to "Immigration", which is the abbreviation for the Immigration Bureau, then one of the departments under the head of the Secretary of Commerce and Labor at Washington, for warrants of arrest for Leung Toe and Choy Gum, and this is immediately followed by the formal application for the warrant, and this is in turn followed by the telegraphic answer of the Assistant Secretary of Commerce and Labor issuing a warrant against Leung Toe and refusing to issue a warrant

against Choy Gum. (Tran. 30-31-32.) Notwithstanding that under the terms of this telegram of September 21st, the department refused to issue a warrant in the arrest of Choy Gum, and that she should thereafter have been discharged, she was none the less held in custody by the Immigration officials, and on the 25th of September we find them again wiring the department for a warrant of arrest, in which they represent that Choy Gum's true name is Lo King, and that she had been landed in this country on October 23, 1908, on the SS. "China" as the wife of a native, and asked if that would affect the department's attitude in issuing a warrant, and thereafter on the following day a warrant for her arrest was issued. (Tran. 33.) The warrant of arrest itself contains the following charge against this appellant:

"That the said alien is a prostitute and has been found practicing prostitution subsequent to her entry into the United States."

The next proceeding had in this matter was on October 10th, when in response to being called upon to appear for arraignment Choy Gum appeared before Immigration Inspector-In-Charge Ainsworth, and she testified as follows:

"My name is Choy Gum (Tran. 35). I have no other name. I arrived in the United States when two years old. I do not know anyone by the name of Lo King who arrived on the SS. 'China' October 23, 1908, as the wife of Hum Mow Hing. I did not arrive here then. I have been here since I was two years old."

Upon being shown a photograph of Lo King on the certificate of marriage Choy Gum states that it is not her picture. Assistant Commissioner Edsell then states that he had compared Choy Gum with the photograph, and stated in his opinion it was a likeness of her, after which Choy Gum was again asked if she was the person represented by the said photograph (Tran. 36), and she replied that she was not, and that she had told the truth before the interpreter before when she said that she had been here when she was two years old, and that all the statements made by her were true, and that she had understood the interpreter.

Then follows the statement of Inspector-In-Charge Ainsworth, in which he expresses it as his judgment that Choy Gum is the person represented in this record as Lo King, wife of a native, Hom King Fook, on the SS. "China" November 23, 1908, and whose photograph is attached to the record. At this point in the proceeding attorney George A. McGowan was permitted to appear on behalf of the alien and upon his statement that he had not seen or received any copy of any of the papers in the matter, and that he wished to inspect them all before taking up the defense. (Tran. 37.) Thereupon the attorney was then shown the record in the case as far as it had been written up, and which testimony consists of the testimony of Choy Gum, Leung Toe, Tong Yook Lan and Wong Goe, and thereafter the case was continued until October 24th.

Choy Gum was then arraigned, and advised of the charge against her, and told that she would have an opportunity of examining the records in the case, and to show cause, or employ counsel to show cause why she should not be deported, and asked if she wished to employ counsel, she stated that she already had an attorney present. (Tran. 38.)

While not appearing in the record, the hearing in this matter was continued from October 24th to November 7th, at which time the following proceedings took place before the said Immigration Inspector-In-Charge Ainsworth:

“(By Inspector AINSWORTH.) This is a continuation of hearing in the Choy Gum case, under Departmental Warrant No. 53510/212, dated September 26, 1912, charging that said alien is a prostitute and has been found practicing prostitution subsequent to her entry into the United States. Mr. McGowan, what do you wish to introduce at this time?”

Attorney McGOWAN. In compliance with the direction of the Department as stated by you, the defense and evidence to be presented on behalf of this woman will be submitted in the form of affidavits. Preliminary to the production of those affidavits I desire to make certain protests and exceptions.” (Tran. 39.)

NOTE. The second exception is the only one set forth, the first and third exceptions not now being urged before the Court on this appeal.

“SECOND. The second exception which we desire to reserve is the incorporation in the record of the testimony of Wong Go and the

testimony of the girl, Tom Yook Lan, upon the ground that the use of the testimony as given is detrimental to the detained and it has prevented the detained from an opportunity for cross-examination, the right of counsel being denied her at the time the testimony was taken. This testimony being detrimental and being taken at a time when counsel was denied the detained, we protest and take exception to the incorporation in this record. I desire to protest against the case being closed without an opportunity being afforded the detained to have counsel cross-examine the witnesses for the Government." (Tran. 40.)

The case which we desire to present on behalf of the detained will consist of three affidavits which will be filed in the City Office this afternoon and they will reach you tomorrow morning.

(Attorney McGOWAN continues.) I would like to ask if the Government has anything to offer in this case further than copies of which have already been presented to the detained which consist of the statements of the three girls, Choy Gum, Leong Toe, and Tom Yook Lan, and the Chinese witness, Wong Go.

Inspector AINSWORTH. There is offered in evidence affidavits of two police officers who made the raid. These are the originals and I understood you had copies.

Attorney McGOWAN. This is the first I have seen of them. After having inspected the affidavit of Arthur D. Layne, and the affidavit of Dennis Bohle, both of which are under date of the 15th of October, 1912, we desire to protest against the introduction of these affidavits in evidence on the ground that it is evidence presented after the detained was permitted the right of counsel and we (Tran. 41) request that an opportunity be afforded for cross-examination of these two witnesses for the Government, and in the event of this being

denied we desire to except and protest against the case being closed unless the right of counsel be afforded.

Inspector AINSWORTH. I will say, Mr. McGowan, in this respect, that the case has been awaiting the alien's showing why she should not be deported since October 10th, and the record was available at all times, and it has been postponed a number of times at the request of alien's attorney. I do not feel justified in holding it open any more and will send the record as it appears to Washington with the protest made by you being part of it.

Attorney McGOWAN. I desire to say that this knowledge was the first intimation I had that these affidavits were in the record and I believe that the right of cross-examination should be accorded the detained, and I desire to protest at same not being done.

Inspector AINSWORTH. The instruction under which I am acting is that this hearing is informal and simply that the charge has been against this alien and she has replied thereto as seemed best to her. The protest or objection regarding the conduct of the case might properly be made in such documentary form as you may deem proper to present for the consideration of the Secretary.

Attorney McGOWAN. We desire to protest at this limitation upon the right of counsel and this abridgment on the ability of the defendant to properly present a full and adequate defense. (Tran. 42.)

You can send the case to the Department tomorrow because my protest may be considered as a brief in itself and the case will be represented before the Department by Attorneys Stabben & Stewart, Union Trust Building." (Tran. 43.)

The affidavits mentioned as constituting the defense of Choy Gum comprise pages 43, 44, 45, 46, 47, 48 and 49 of the record of the transcript.

The first is an affidavit by Leung Tan, the lessee of the building at No. 5 St. Louis Alley from which this appellant and the other two Chinese women were taken by the Immigration authorities on September 20, 1912. Leung Tan states that he has not at any time permitted, and would not permit the use of this building leased by him as aforesaid for the use or the purpose of conducting therein a house of ill fame or questionable character, and that he personally inspected the said premises, and feels certain that they were honestly conducted as a rooming house, and that the premises were not operated or conducted as a house of ill fame, nor was there conducted in said premises a house of ill fame. That this affiant being the lessee of the building, frequently inspects the premises, and feels confident in making the assertion that there has not been conducted in said premises any house of ill fame or place of questionable character.

The affidavit of Bow Shee is to the effect that she has known Choy Gum intimately for upwards of three years prior to her arrest, and that during all of that time she was very intimately acquainted with her, and has always known her to be a woman of respectability. That she has always lived in places occupied by Chinese families of good character, and she deposes further that if Choy Gum had been following an immoral life or had been

a member or an inmate of a house of ill fame since her residence in this country, this affiant feels that she would have had knowledge of this fact, because of the fact that she saw her very frequently and also by reason of the acquaintance of this affiant with others who saw Choy Gum very frequently, and this affiant feels certain that had Choy Gum ever been following an immoral occupation that she would have known it, or would have received some information concerning it. Therefore, this affiant declares upon oath that to the best of her knowledge, information and belief as above set forth that Choy Gum had not followed a life of immorality or had been guilty of any immoral conduct or been an inmate of any house of ill fame, but on the contrary that she was a woman of respectability and associated with people of respectability, and that her character is good.

Gee Shee in her affidavit recites that she is personally acquainted with Choy Gum. That she has known her upwards of three years prior to her arrest, and that during all of her acquaintance with her this affiant has known Choy Gum as a woman of respectability and good character, and has never heard or known of her at any time following a life of immorality, or of her having been an inmate of a house of ill fame, and this affiant having associated with her during all of the time hereinbefore set forth at frequent intervals, she feels that Choy Gum could not have been of immoral character, or followed an immoral life without the same having

been known to this affiant. This affiant further advises that she has frequently seen Choy Gum, and has associated with her almost continuously for three years prior to her arrest, and that she has always known her as a woman of good character, and respectability. This affiant further declares that she is so intimately acquainted with Choy Gum that had Choy Gum been leading a life of immorality, that the same would undoubtedly have become known to this affiant, and therefore, this affiant declares upon oath that Choy Gum is a woman of good character both from the facts within the knowledge of this affiant, and on account of the high reputation that Choy Gum has of always associating with women of good character.

The joint affidavit of Toy Lan and May Sing is to the effect that these affiants are personally acquainted with Choy Gum who was arrested at No. 5 St. Louis Alley. That she is now about 21 years old, and that she has been known to these affiants continuously since she (Choy Gum) was a child. That during all of their acquaintanceship with Choy Gum she was always a resident of the State of California, and that these affiants were well acquainted with her during all of her childhood, and ever since she attained her womanhood, and during all of these times have known her to be a person of respectability, and living with good families. These affiants further declare that if Choy Gum had at any time been following an immoral life or been a member of a house of ill fame that they

feel positive that their acquaintanceship with her was such that they would have knowledge of that, as they saw her frequently, and also because of the acquaintance of these affiants with other persons who knew Choy Gum, and who had also seen her at frequent intervals, and these affiants feel certain that they would have been aware if she had been following an immoral occupation, or that these affiants would have some knowledge concerning it. Therefore, these affiants declare upon oath to the best of their knowledge, information and belief that Choy Gum has not during her acquaintanceship with these affiants followed a life of immorality or carried on any immoral conduct, or been the member or an inmate of a house of ill fame, but on the contrary that she has been a person of respectability, and that her character is good. These affiants further depose that the upstairs portion of the house at No. 5 St. Louis Alley is not a house of ill fame, but a respectable Chinese rooming house.

The above affidavits constitute the additional defense submitted upon behalf of Choy Gum.

The two affidavits which the Immigration authorities took upon the 15th day of October, 1912, at San Francisco before Chinese Immigration Inspector W. M. Gassaway, and the existence of which was not disclosed to the detained and her attorney until the final hearing upon the 7th day of November, 1912, and thus afforded Choy Gum no opportunity of

answering them, occupy pages 50, 51 and 52 of the record.

Arthur D. Layne declares that he is a police officer attached to the regular police department of San Francisco, and holds the rank of sergeant. That he has been detailed in that portion of San Francisco commonly known as Chinatown at various times during the past four years. That in said place is situated No. 5 St. Louis Alley, and that he knows the general reputation of those premises, and that it has the general reputation in Chinatown of being a house of prostitution, and was such upon the 20th day of September. This affiant further deposes that on the 20th day of September he received information that certain alien women were being held in this place, and acting in accordance with this information he visited the premises on that date, and after gaining entrance found Choy Gum and Leung Toe in said premises in an endeavor to escape to the roof by means of a ladder.

The affidavit of Dennis Bohle sets forth that he is a member of the police department of San Francisco, that he has been detailed in the Chinatown section of San Francisco most of the time for two years past. That he knows the general reputation of the premises at No. 5 St. Louis Alley to be that of a house of prostitution, and that it was such on the 20th day of September, 1912. That affiant, acting in obedience to orders, visited the premises on the said date, and in company with Sergt. Layne assisted in arresting two Chinese alien women in the

said house of prostitution situated at said place, and that at the time of the arrest of these two alien women, Choy Gum and Leung Toe, they were in the said house of prostitution making an endeavor to escape to the roof.

After a consideration of this case by the Department the appellant was ordered deported by Benj. S. Cable, Acting Secretary of Commerce and Labor upon the charge

“That the said alien is a prostitute and has been found an inmate of a house of prostitution and practicing prostitution subsequent to her entry into the United States, and may be deported in accordance therewith.”

The foregoing statement of this case is taken in a narrative form running through the entire record. The petition for a writ of habeas corpus sets forth four assignments upon which is based the charge that this appellant was detained and deprived of her liberty without due process of law in that she was denied a fair opportunity to test the sufficiency or the weight of the evidence against her, or to present her defense to the charge brought against her in said warrant of arrest. The four particulars specified are contained on pages 5, 6, 7, 8, 9 and 10 of the record, and are virtually the subject of the assignment of errors that immediately follow and for that reason need not be recited in this statement. There is a fifth allegation of the petition alleging that the appellant is and always has been a woman of good character, and is not objectionable

as charged in the warrant of arrest or the warrant of deportation. The petition for a writ of habeas corpus had annexed thereto a copy of the executive hearing before the Immigration officials. The respondent interposed a demurrer to this petition which is contained on page 55 of the record which alleged that the petition does not state facts sufficient to entitle the petitioner to an issuance of a writ of habeas corpus.

The Immigration Act of February 20th, 1907, as amended by the Act of March 26th, 1910, recites in part as follows:

“Sec. 3. * * * Any alien who shall be found an inmate of or connected with the management of a house of prostitution or practicing prostitution after such alien shall have entered the United States * * * shall be deemed to be unlawfully within the United States and shall be deported in the manner provided by sections twenty and twenty-one of this Act. * * *”

“Sec. 20. That any alien who shall enter the United States in violation of law * * * shall, upon the warrant of the Secretary of Commerce and Labor, be taken into custody and deported to the country whence he came at any time within three years after the date of his entry into the United States. * * *”

“Sec. 21. That in case the Secretary of Commerce and Labor shall be satisfied that an alien has been found in the United States in violation of this Act, or that an alien is subject to deportation under the provisions of this Act, or of any law of the United States, he shall

cause such alien within the period of three years after landing or entry therein to be taken into custody and returned to the country whence he came, as provided in section twenty of this Act. * * *

“Sec. 22. That the Commissioner-General of Immigration * * * shall under the direction of the Secretary of Commerce and Labor * * * establish such rules and regulations * * * and shall issue from time to time such intructions, not inconsistent with law, as he shall deem best calculated for carrying out the provisions of this Act and for protecting the United States and aliens migrating thereto from fraud and loss. * * *

Under the authority contained in the last section the Commissioner-General of Immigration, with the approval of the Secretary, has issued and promulgated the following regulation, which is the regulation as it was in force at the time of the hearing hereinafter complained of:

“Rule 22.

ARREST AND DEPORTATION ON WARRANT.

Subd. 4. Execution of warrant and hearing thereon.

(a) Upon receipt of a warrant of arrest the alien shall be taken before the person or persons therein described and granted a hearing to enable him to show cause, if any there be, why he should not be deported. * * *

(b) During the course of the hearing the alien shall be allowed to inspect the warrant of arrest and all the evidence on which it was issued; and at such stage thereof as the officer before whom the hearing is held shall deem proper, he shall be apprised that he may thereafter be represented by counsel and shall be required then and there to state whether he

desires counsel or waives the same, and his reply shall be entered on the record. If counsel be selected, he shall be permitted to be present during the further conduct of the hearing, to inspect and make a copy of the minutes of the hearing, so far as it has proceeded, and to offer evidence to meet any evidence theretofore or thereafter presented by the Government. Objections and exceptions of counsel shall not be entered on the record, but may be dealt with in any accompanying brief. * * *

(c) At the close of the hearing the full record shall be forwarded to the Bureau, together with any written argument submitted by counsel and the recommendations of the examining officer and the officer in charge for determination as to whether or not a warrant for deportation shall issue."

Specification of Errors.

Specification of errors relied upon occupy pages 59, 60, 61 and 62 of the record, and may be condensed into the following four assignments. The pages noted after each specification have reference to the location in the transcript of that portion of the petition referred to in specification.

"First. That the Court erred in holding that it was not an abuse of discretion by the immigration authorities, and did not deprive the alien, the petitioner herein, of a fair hearing, to incorporate in the record against the said alien the testimony of Leong Toe, Ton Yook Lan and Wong Go, which said witnesses had been sworn to tell the truth touching the legality of their own residence in the United States, and not the legality of the residence of

this alien, the petitioner herein; and who were self-interested witnesses, seeking self-protection and liberation, and who, under promise and hope of immunity, testified to the detriment of the petitioner; and in refusing to set a time and place for the examination of the said witnesses upon behalf of the petitioner herein, as more fully contained in the first specification of unfairness contained in the petition on file herein. (Tran. 5 and 6.)

“Second. That the Court erred in holding that it was not an abuse of discretion by the immigration authorities, and did not deprive the alien, the petitioner herein, of a fair hearing, to conduct for the Government a hearing, and take the testimony of Arthur T. Layne and Dennis Bohle, against the petitioner, without notice to either the petitioner, or her attorney, and in their absence embody the said testimony in the form of affidavits, and thus deprive the petitioner of any opportunity to answer the same, or test the knowledge or credibility of the said witnesses; and in withholding the fact that said testimony had been so taken until the final hearing in the said matter, and then not afford the petitioner any opportunity to answer the said evidence, all as more particularly alleged in the second specification of unfairness contained in the petition on file herein. (Tran. 7 and 8.)

“Third. The Court erred, in holding that it was not an abuse of discretion, and did not deprive the alien of a fair hearing, for the Commissioner of Immigration, after the close of the Government case against the said alien, the petitioner herein, to submit evidence to the department detrimental to the said alien, the said petitioner herein, which said detrimental evidence had been previously withheld from the said alien, the petitioner herein, and no opportunity at all afforded her at any time of

meeting, or answering, the said evidence, which was clandestinely forwarded to the Secretary of Labor, and in so abridging and limiting the right of the counsel of the alien, as to prevent counsel from ascertaining all the evidence submitted against the said alien, the petitioner herein; all as more particularly alleged in the third specification of unfairness contained in the petition on file herein. (Tran. 8 and 9.)

“Fourth. The Court erred in holding that it was not an abuse of discretion, and did not deprive the alien, the petitioner herein, of a fair hearing for the immigration authorities to submit their evidence against the alien, the petitioner herein, in the form of oral examinations from the witnesses prior to according the alien the right of an attorney and to thereafter present the evidence from the Government witnesses in the form of *ex parte* affidavits, thus preventing and depriving the alien, the petitioner herein, of any opportunity of being confronted with any witnesses being presented against her, and depriving her of any and all opportunity to submit evidence of said Government witnesses upon her own behalf; all as more particularly alleged in the fourth specification of unfairness contained in the petition on file herein.” (Tran. 9 and 10.)

FIRST.

“That the Court erred in holding that it was not an abuse of discretion by the immigration authorities, and did not deprive the alien, the petitioner herein, of a fair hearing, to incorporate in the record against the said alien the testimony of Leong Toe, Ton Yook Lan and Wong Go, which said witnesses had been sworn to tell the truth touching the legality of their own residence in the United

States, and not the legality of the residence of this alien, the petitioner herein; and who were self-interested witnesses, seeking self-protection and liberation, and who, under promise and hope of immunity, testified to the detriment of the petitioner; and in refusing to set a time and place for the examination of the said witnesses upon behalf of the petitioner herein, as more fully contained in the first specification of unfairness contained in the petition on file herein." (Tran. 5 and 6.)

This appellant, Choy Gum, feels that she has been very much aggrieved, injured and oppressed by the action taken against her by the immigration authorities, and that she is being deprived of her liberty, and her right of residence within the United States terminated in a most summary, unlawful and arbitrary manner. According to the sworn testimony of Choy Gum and a number of her witnesses she has resided in the United States for upwards of twenty years, and upon these facts being made known to the Secretary of the Department of Commerce and Labor, he refused to issue a warrant of arrest for her. Thereafter, upon the representation of the Commissioner of Immigration for the Port of San Francisco that she had entered the United States as a citizen's wife under the name of Lo King on the SS. "China" on the 23rd day of October, 1908, the warrant of arrest was issued. Upon the hearing there was not presented the evidence of a single witness that Choy Gum was other than just what she claimed to be, the sole showing made by the Government being the statement of

Assistant Commissioner of Immigration Edsell and Immigration Inspector-In-Charge Ainsworth that in their opinion from a comparison of Choy Gum with the photograph in the record in the case of Lo King that she was one and the same person. Mistakes of identity are so usual and many that it seems an abuse of discretion that the opinion of these two officers should be accepted to overturn the sworn testimony of a half dozen witnesses. It certainly seems that if Choy Gum was Lo King, the Government would have been able to produce some witness who knew her or of her as such person to testify to that fact, and it seems an abuse of discretion to accept the opinion of these two officers as not only counterbalancing but outweighing the sworn testimony of a half dozen different witnesses, each of whom were in a position to know the truth of the matters to which they testify.

This appellant feels further aggrieved and injured that she should have been victimized and advantage taken of her by Wong Go and Ton Yook Lan, the young couple from Stockton, who to clear themselves from the trouble that they were implicated in, besmirched the character and reputation of this appellant. Wong Go as is shown by the caption which preceeded the examination was "alleged to be in the United States illegally", while Ton Yook Lan was being examined upon the same charge and for the same purpose as was this appellant and Leung Toe. It is alleged in the petition for a writ of habeas corpus that the statements of these two

witnesses was given under oath in their own matter, and that they were not sworn to testify to the truth in the case of this petitioner, and that they made self-serving declarations to get themselves out of trouble, and in an endeavor to extricate themselves from the predicament that involved them; that they were under duress of confinement when testifying, and they were seeking liberation as a consideration for the testimony which they gave to the detriment of this petitioner. While it is true that the right of counsel may not be accorded to such a person immediately after arrest, this petitioner maintains that it would have been proper and was indispensable to a fair hearing that her counsel should have been permitted an opportunity of examining these witnesses before they were discharged from the custody of the immigration officials and turned out into the world where this petitioner could not thereafter find them to secure their evidence. The Government may say that it would be inconvenient for them, and that they could not hold these two people in custody for that purpose, but this record shows that when they want to hold a person in custody they are able to do so, for it is of record herein that they held this petitioner in custody from the 21st of September, when the Department refused to issue a warrant in her case until the 25th of September, when the warrant was actually issued. If they can hold people in custody for such a length of time for one purpose, they may certainly do so for another. Counsel for the appellant was present there

at the Immigration Station daily during all of this time, and could and would have appeared to represent the appellant and examine these witnesses at any time during this detention, and it certainly prevented the appellant from a fair opportunity to present her defense when the Government refused to allow her the privilege of having an attorney represent her officially on the record herein or become acquainted with the contents of the record for her protection until after the witnesses whose testimony had damaged her had been dismissed and permitted to go their several ways, while Choy Gum was detained in custody, though a warrant of arrest had been refused.

The Supreme Court of the United States in the case of *Low Wah Suey v. Backus*, 225 U. S. p. 460, the Court decided as follows:

“A series of decisions in this Court has settled that such hearings before executive officers may be made conclusive when fairly conducted. In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings it must be shown that the proceedings were manifestly unfair, that the action of the executive officers was such as to prevent a fair investigation or that there was a manifest abuse of the discretion committed to them by the statute. In other cases the order of the executive officers within the authority of the statute is final.”

It is desired, in passing, that this Court note that Congress in authorizing the promulgation of the rules and regulations under which these hearings

are held, has provided that the regulations should be "*not inconsistent with law*", and further, the refreshing degree of mutuality between the respective rights of the Government and the aliens, when Congress also provided for "*protecting the United States and aliens migrating thereto from fraud and loss*".

The regulations in question were the subject of an opinion by this honorable Court in the case of *Roux v. Commissioner of Immigration*, 203 Fed. 413, in which this Court held:

"These provisions indicate the solicitude of the Department of Commerce and Labor that the alien shall have a fair and altogether impartial and unbiased hearing, free from restraint or any undue influence in the manner of his defense to any charges made against him upon which he may be deported. Was the petitioner accorded such a hearing before the inspectors? * * *

"Rule 22 but reflects how essential it may be for the accused to have counsel. * * *"

In the case of *Low Wah Suey v. Backus*, supra, the Court held that:

"It is alleged that the rules of the Secretary of Commerce and Labor are arbitrary and illegal, particularly certain sections of Rule 35. From these rules, it appears, that, while provision is made for an examination in the absence of counsel, it is provided that a hearing shall be had at which the alien shall have full opportunity to show cause why he should not be deported, and that, at such stage of the proceedings as the person before whom the hearing is held shall deem proper, the alien shall be apprised that he may thereafter be repre-

sented by counsel, who shall be permitted to be present at the further conduct of the hearing, to inspect and make a copy of the record of the hearing so far as it has proceeded and to meet any evidence that theretofore has been or may thereafter be presented by the Government, and it is further provided that all the papers, including the minutes and any written argument submitted by counsel, together with the recommendations, upon the merits, of the examining officer and the officer in charge shall be forwarded to the Department as the record on which to determine whether or not a warrant for deportation shall issue. Considering the summary character of the hearing provided by statute and the rights given to counsel in the rules prescribed, we are not prepared to say that the rules are so arbitrary and so manifestly intended to deprive the alien of a fair, though summary hearing, as to be beyond the power of the Secretary of Commerce and Labor under the authority of the statute."

It is to be observed that the Supreme Court states:

"We are not prepared to say that the rules are so arbitrary and so manifestly intended to deprive the alien of a fair though summary hearing as to be beyond the power of the Secretary,"

and therefore we must look beyond the requirements of the rule to the hearing which was actually accorded under the rule as interpreted by the Immigration authorities, for it is obvious that while the rule does not contemplate a hearing so arbitrary as to deprive the alien of a fair hearing, it is none the less a fact that hearings coming under this

rule may in fact be so conducted in some instances to give a fair hearing, and in other instances to so strip the alien of opportunity to submit a defense that she is accorded nothing but the semblance of an opportunity to make a defense to the charge brought against her.

In the case at bar the two witnesses Wong Go and Ton Yook Lan are the two who gave evidence detrimental to this appellant, and whose testimony is considered under this assignment. These witnesses were in the custody of the Immigration authorities. They were actually being examined touching the legality of their own residence in this country, and it is alleged in the petition that as part of the consideration for the testimony which they gave detrimental to this petitioner they were restored to their liberty and were so actually restored to their liberty at a time and in such a manner as to deprive this appellant of any opportunity of cross-examining them. During the time in question this appellant had an attorney in attendance at the immigration station, waiting to be permitted to represent her in this case, and to acquaint himself with the record so that he could properly defend her and all of this while his service would have had some practical useful value to this petitioner while these witnesses were there in the custody of the Immigration authorities, they, the Immigration authorities, however, refused to permit the appellant to have the right of counsel when it would have been of some practical value, and de-

ferred permitting her that right, and held her thus defenseless for days after these two witnesses had been restored to their liberty, and been permitted to go their several ways, which were unknown to this petitioner. It is therefore seen upon this statement of facts that the hearing which was actually accorded the appellant was nothing but the semblance of a hearing. It cannot be said that there was any good reason for withholding the right of counsel after the Government had secured the testimony which they desired, and it was, appellant insists, an abuse of discretion to withhold the right of counsel until after the witnesses who had given testimony against her had been permitted to depart. Along this line and considering just how these statutes should be construed there ^{are} ~~is~~ two very important cases to which the attention of this honorable Court is directed:

In the case of *Redfern v. Halpert*, 186 Fed. Rep. 150, The Circuit Court of Appeals passes upon how these Immigration Statutes should be construed and uses the following language:

“The Immigration Statutes are very drastic and deal arbitrarily with human liberty, and I consider they should be strictly construed.”

In the case of *U. S. v. Williams*, 185 Fed. Rep. 698, Judge Holt speaks very clearly about hearings of this kind. He states:

“It is, of course, obvious that such a method of procedure disregards almost every fundamental principle established in England and

this country for the protection of persons charged with an offense. The person arrested does not necessarily know who instigated the prosecution. He is held in seclusion, and is not permitted to consult counsel until he has been privately examined under oath. The whole proceeding is usually substantially in the control of one of the inspectors, who acts in it as informer, arresting officer, inquisitor and judge. The Secretary who issues the order of arrest and the order of deportation is an administrative officer who sits hundreds of miles away, and never sees or hears the person proceeded against or the witnesses. Aliens, if arrested, are at least entitled to the rights which such a system accords them, and if they are deprived of any such right the proceeding is clearly irregular, and any order of deportation issued in it invalid."

To sum up the Government's attitude in these cases as it may be defined from the kind and class of hearings which they afford, it is obvious that they entirely lose sight of the fact that the defense of an alien consists of two parts; the first part in which the alien's defense may be divided consists of the affirmative showing upon their behalf by their own witnesses. The Government interposes no objection to the introduction of this defense, save that they insist that you shall make your defense in the form of affidavit; that they do not want to be bothered with taking the testimony of the witnesses. The second part of the defense which would consist of an attack upon the case made out by the Government against the alien, in other words, showing the weakness within the Government's case

itself, is denied the alien, because the kind and class of procedure which the Government follows so safeguards its evidence as to render it impossible for the alien to attack the Government's showing. The Government causes its witnesses to be examined by question and answer, while they withhold the right of counsel to the alien, and then after the right of counsel has been allowed the alien, it is too late to examine the witnesses because they have been dismissed and have departed, where no one knows. Under these circumstances it is seen that the Government does not permit the alien to attack its defense in any way, and that the class and kind of hearing which they accord safeguards their defense from attack. This manner of procedure always assures that the Government shall have some evidence as a basis for a warrant of deportation because they prevent the detained from attacking that evidence. They of course permit the alien to submit evidence which would tend to show the falsity of their evidence, but the most which the alien is permitted is to create a conflict in the evidence. The alien is not permitted to make any direct attack upon the Government's evidence by the examination of the Government witnesses, and we submit that this is nothing but the semblance of a hearing, and under such circumstances as are set forth in this case, does deprive the alien of a fair hearing to present her defense. This point is very clearly brought out in the case of *Hanges v. Whitfield*, 209 Fed. 675, in which it is held that:

(P. 677) “(1) The Court will not in proceedings of this character consider the testimony or the weight thereof, if properly and fairly taken, to determine whether or not it is sufficient to warrant the deportation of an alien. That would be for the proper immigration officials to determine. But the Court may, and it is its duty to, consider the manner of procuring the testimony, its competency and legal admissibility against the petitioners, and determine whether or not they have had a fair and impartial hearing or trial.” (See cases cited.)

* * * * *

(P. 679) “True, the proceeding for this purpose may be summary, and before an executive, or other authorized official of the Government, but it must be a lawful proceeding, the charge established by competent evidence, and the aliens afforded a fair hearing and opportunity to discredit or disprove the evidence adduced against them. Such an opportunity requires that they have the benefit of counsel at every stage of the proceedings after their arrest, with the right to cross-examine witnesses whose testimony is to be used against them before the Bureau of Immigration in determining whether or not they should be deported.

“The right of cross-examination is one of the principal, as it is one of the surest, tests which the law affords for the ascertainment of the truth in all disputed matters of fact, and it is indispensable in all judicial proceedings in this country, civil or criminal, that ex parte testimony, even though given under the solemnity of a legal oath or affirmation that it is true, taken in the absence of and without opportunity at some stage of the proceedings to the party against whom it is proposed to be used to cross-examine the witnesses giving such testimony, cannot rightly be used against him.”

We feel that we have submitted sufficient authority for showing that this alien has not been permitted a fair or adequate opportunity to submit her defense, and that her right of counsel has been so impaired as to be of very little value to her. We believe that the action of the Immigration officials in this case is directly in violation of the mandate of the statute and the decisions of the Supreme Court of the United States, particularly that of *Low Wah Suey v. Backus*, *supra*, and the long line of decisions which precedes it, and upon which it is based. We have upon this point made reference to *Wong Go*. This young man was landed in this country as a merchant's minor son, and his father shortly thereafter went to China. The boy commenced laboring at a monthly salary, and while under the decision of this Court in the case of *U. S. v. Foo Duck*, 172 Fed. 856, these facts would not render him liable to deportation, it is none the less a fact that the Immigration authorities have since the rendition of this decision started a campaign for the deporting of Chinese who have been laboring, out of this country, when it is shown that they entered as merchants' minor sons. These cases have re-occurred in many of the different Federal Courts over the United States, and among them may be mentioned the cases of *U. S. v. Lim Yuem*, 211 Fed. 1001, and the case of *In the Matter of Lew Gin Shew*, No. 15673, in the lower Court from which this case at bar comes. The decision has not yet been printed in the advance sheets of the Federal

Reporter. There were other similar prosecutions in the southern district of this State, and also in various other districts of the United States showing that the Immigration authorities granted this witness consideration in not prosecuting him.

With respect to the witness Ton Yook Lan it is also noted that she entered the United States claiming to be a native, and that her mother shortly afterwards went to China, leaving this young girl in this country, and under these circumstances the Immigration authorities have arrested women of this kind, and contested their right to be in this country, making them prove their nativity and respectability. One case of this character has been before this Court on a prior occasion, the case being that of *Haw Moy v. North*, 183 Fed. 89. It is alleged in the petition that these two witnesses were promised immunity or in other words that their testimony which was detrimental to this petitioner, was given as the result of a promise of their liberation. These witnesses gave the testimony and they were liberated, and the petition making the allegation as it does that their testimony was the result of the promise made to them, we feel that the writ should have issued so that the truth of this allegation may have been inquired into. It is certainly obvious that if the Immigration authorities or any one on their behalf made any such promise to these witnesses to induce them to testify against this petitioner and in doing so they testified falsely, the hearing was certainly unfair to an extent which would

vitiate the entire proceeding. We feel upon this point the petition does state a cause of action which is sufficient to cause to be granted to appellant the relief which she asks, which was a hearing before the Court.

SECOND.

“That the Court erred in holding that it was not an abuse of discretion by the immigration authorities, and did not deprive the alien, the petitioner herein, of a fair hearing, for the Government to conduct a hearing, and take the testimony of Arthur T. Layne and Dennis Bohle, against the petitioner, without notice to either the petitioner, or her attorney, and in their absence embody the said testimony in the form of affidavits, and thus deprive the petitioner of any opportunity to answer the same, or test the knowledge or credibility of the said witnesses; and in withholding the fact that said testimony had been so taken until the final hearing in the said matter, and then not afford the petitioner any opportunity to answer the said evidence, all as more particularly alleged in the second specification of unfairness contained in the petition on file herein.” (Tran. 7 and 8.)

It will be observed that upon October 10, 1912, the right of counsel was accorded to Choy Gum, this appellant. (Tran. 38.) After that date the alien was entitled to the right of counsel as specified in subdivision 4 of rule 22. (b)

* * * “If counsel be selected, he shall be permitted to be present during the further conduct of the hearing, to inspect and make a copy

proceeded and to offer evidence to meet any evidence theretofore or thereafter presented by the Government. Objections and exceptions of counsel shall not be entered on the record, but may be dealt with in an accompanying brief, * * *"

or as interpreted by the Supreme Court in the case of Low Wah Suey v. Backus, supra, as hereinbefore cited to the Court's attention. It further appears that a hearing was held before the Immigration Authorities upon the 15th day of October, 1912, at which the testimony of Arthur D. Layne and Dennis Bohle was taken. The hearing at which the testimony of these two witnesses was taken was held before Chinese and Immigrant Inspector W. M. Gassaway, and the testimony was taken in the form of affidavits. These affidavits while written on the official paper of the Immigration service, were actually made in the San Francisco office of the Immigration service on the lower floor of the Custom House, which is a matter of but two or three blocks distant from the office of the attorney for this appellant, and while the regulation prescribes that the alien and her attorney shall be permitted to be present during the further conduct of the hearing, no notice of any kind was given to the alien or her attorney that this hearing would take place or that this testimony then and there reduced in the form of affidavits would be taken, and the alien was thus prevented from any opportunity of being represented thereat. This breach and violation of the said regulation cannot be justi-

of the counsel for the alien is in close proximity to the San Francisco Immigration office, and her counsel would have been glad to have responded to a telephonic communication at any time to be present to represent her at said hearing. The contents of these affidavits were detrimental to the alien, and very prejudicial to her rights. This case comes clearly within the exception in the case of *ex parte Pouliot*, 196 Fed. Reporter, 437-442, in subdivision 7, in which said decision appears the following:

"The claim that the petitioners were not accorded a full and fair hearing before the executive officers is based upon the fact that the inspector took certain affidavits *ex parte*, and in the absence of the petitioners, and reported certain facts communicated to him by third persons, to the department. There is no denial of the fact that the petitioners were given a full and fair opportunity to be heard, and that all testimony offered in their behalf was received. What amounts to such a full and fair hearing as the law contemplates has never been defined by the Courts. Perhaps the practice of submitting *ex parte* affidavits and of reporting independent facts is not to be commended; but the mere fact that such a report has been made, or such affidavits transmitted, will not entitle an alien to a release on habeas corpus, unless it appears that he has, or may have been prejudiced thereby. No such prejudice can be predicated on the acts of the inspector in this case. The *ex parte* affidavits taken, and the *ex parte* statements made, simply tend to confirm facts which appear in the testimony of the petitioners themselves, and could not change the result. Were I to exclude all incompetent testi-

mony and determine the case *de novo* on the competent testimony alone, I could not reach a different conclusion."

The distinction between the case of this appellant and the case just cited rests in this, that in the latter case the objection was a matter of form and not of substance, in this that the affidavits recited nothing excepting that which was contained in the preliminary statements first taken from the Pouliot people, and their objection to the consideration of the affidavits therefore rested not upon a showing that the averments contained in the affidavits were untrue, and would have gone to the substance of the matter, but were simply based upon an empty question of procedure because no different set of facts was contended for or shown to have existed upon their behalf, and therefore the Court very properly in that case determined that the objectionable *ex parte* statements simply confirmed the facts appearing in the testimony of the petitioners, and could not have changed the result, or as stated by the judge in that case "were I to exclude all incompetent testimony and determine the case *de novo* on the competent testimony alone, I could not reach a different conclusion". In the case at bar an entirely different set of facts existed. There is no other evidence in the record against this appellant that the house in which she was arrested was a house of ill fame. Certainly the formal application for the warrant of arrest and the charges contained in the warrant of arrest are not to be con-

sidered as evidence or the leading complex and compound questions propounded by the examining inspector, and are not to be considered or classed as evidence, and so it resolves itself to the proposition that in this case there is no evidence of any kind in the record which shows that the premises in question were a house of ill fame, save the contents of these two affidavits, to which exception is taken. The warrant was issued upon the representation that the house in question was a place of ill fame. If the house had not that reputation, and was not of such a character, and that is the substance of the showing made upon behalf of the alien, then the case would have to fall because of the absence of any evidence upon which to base a warrant of deportation. Most of the decisions which were recited under the preceding or first subdivision of this brief are of course applicable to this point, particularly the case of *Hanges v. Whitfield*, *supra*. Upon the proposition that there must be some evidence to support the warrant of deportation, we desire to cite to the Honorable Court the cases of

Frick v. Lewis, 189 Fed. 146;

Frick v. Lewis, 195 Fed. 693;

Frick v. Lewis, 233 United States.

Upon the question of the right to examine witnesses, and that it has been accorded in different Immigration cases attention is called to the case of *Siniscalchi v. Thomas*, 195 Fed. 701, a decision by the Circuit Court of Appeals for the Sixth Circuit, in which it is held on page 705:

"We are satisfied from the record that, while petitioner and his counsel were not always given notice that testimony on this subject was to be taken, still petitioner was represented by counsel in the taking of part of the testimony, and a copy of all the testimony taken in this behalf was furnished to counsel *and opportunity given to examine witnesses or to put in witnesses themselves*. Petitioner did not see fit to take advantage of the opportunity. Counsel believed that the testimony taken at Richmond was immaterial; and when on October 6, 1911, the record as then made up and all the accompanying papers were presented to counsel for inspection, it was stated that they did not wish to offer anything further in the case and were ready to have it submitted." * * *

Further upon this point it might be noted that no question is involved in this case of the right or power of the Government to produce witnesses because in this instance the witnesses actually appeared, and were before the Government officer, and this office of the Immigration service is well equipped to take the testimony of the witnesses appearing there, and it is daily their practice to take testimony in cases arising under the Chinese Exclusion laws and the Immigration laws, and no good or valid reason why the testimony of these two witnesses should not have been taken in the regular manner at that time, save for the sole purpose of depriving an alien of an opportunity to cross-examine these witnesses or submit evidence upon her behalf from these witnesses at that time.

It may be claimed that under the said regulations an alien has not the right to cross-examine witnesses, but it is apparent from the regulations that she may submit evidence, and we submit that under this right, that is the submission of evidence upon her behalf she may have questioned these Government witnesses upon her behalf, and whether their examinations are classed as a cross-examination or not, she is entitled to have the benefit of their testimony. Upon this point the attention of the Court is directed to the case of *Ex parte Ung King Ieng*, 213 Fed. 119, in which it is held:

"The petitioner had no power to produce these witnesses, and if she desired to prove anything by them, or if she desired to test their knowledge of the facts to which they had testified against her, it seems to me that ordinary fairness required that she be permitted to do so. It was suggested at the argument of this question before the court that it would be a 'nuisance' to permit cross-examination. Perhaps it would, but to the petitioner the whole proceeding was probably a nuisance. The rights of the petitioner may not be wholly measured by the convenience or inconvenience to the immigration officers in affording her a fair hearing. Their efforts should be directed to the ascertainment of the truth. They have vast powers accorded them by law, and these powers should be fairly exercised. It is not necessary, of course, that prolonged cross-examinations be permitted. Much must be left to the discretion of the officer. But I am firmly of the opinion that, when the officer in this case refused to permit the petitioner's counsel to ask a single question of witnesses in attendance and testifying to important matters against

her, she did not receive that fair treatment which the law contemplates and to which she was entitled."

It is further urged upon behalf of the appellant in this matter that she was deprived of a fair hearing in the method and manner of the presentation of the evidence of witnesses Layne and Bohle, for this reason, in addition to those heretofore cited. It appears that this evidence was taken on the 15th day of October, 1912. Not only was no notice given of the hearing at which this evidence was taken, but the fact that the evidence was taken was not made known to the alien or her attorney until the very time of the closing of her case, and when the entire record was to be transmitted to Washington. Upon this point it appears from pages 41-42 of the record that the evidence of these witnesses had not been presented, and its very existence was unknown to the alien or her attorney, and that when it was presented, a protest was made to its introduction upon the ground that it was presented after the detained was permitted the right of counsel, and a protest was made to the case being closed without affording an opportunity to the alien of cross-examining these two witnesses, and in the event of that being denied a protest was then made upon behalf of the alien to the case being closed unless the right of counsel be afforded. This phrase is *one which has been selected by the department* to designate what an alien's rights were. The trial Court felt that we should specifically have requested

Court nevertheless had knowledge of the fact, in speaking of the rules and regulations of the Department, that in the practice thereunder the right of examination and cross-examination was allowed. This fact was disclosed by the record on appeal in these cases. On page 25 of the record in the case last above mentioned, a letter was written by the Inspector-In-Charge under instructions from the Department, from which the following is an extract:

“There is no disposition upon the Department’s part to prevent as complete a hearing as may be reasonably requested. * * * It is understood that your purpose, as the attorney for Ursula Zakonaite, is similar to that of this office and Department, viz: to develop the exact facts and to this end all of the witnesses presented will be examined and be subject to cross-examination either on your part or on the part of the government, full record then to be transmitted to the secretary.”

In conclusion I desire to submit that the hearing accorded the alien in this matter has been nothing but the semblance of a hearing, and that her rights have been greatly encroached upon, and she has been prevented from having a fair or adequate hearing or such a hearing as it contemplated by the statutes in such cases made and provided.

The spectacle of permitting Immigration Inspector-In-Charge Ainsworth to conduct such a raid as he claims to have made, and thus be an arresting officer, be the detective to gather the evidence, work up his case, conduct the hearing as

prejudicially as the record discloses, and then sit in judgment upon the same, and submit his recommendation and his findings to the Department, is indeed, we submit, a travesty upon the fair name of justice. No member of the judiciary would so attempt to conduct and demean himself in his official capacity, and we submit that if it is impracticable and unbecoming in a judicial officer to do this, because impartiality may not survive such prejudicial surroundings, how much more so is it objectionable for an Immigration inspector to be permitted to so act. Certainly such a course of conduct has vitally injured this appellant, and prevented her from having a fair trial, and the impartial hearing guaranteed her by the statute.

In submitting this matter your appellant prays that the order of the lower Court be reversed with directions to issue a writ of habeas corpus as prayed for.

Dated, San Francisco,
November 5, 1914.

Respectfully submitted,

GEO. A. MCGOWAN,
Attorney for Appellant.

a continuance for the purpose of meeting this evidence, but we submit as is set forth in the case of *Ex parte Chooy Dee Ying*, 214 Fed. 873, that these proceedings are informal in their nature. In the case just cited the Court stated page 875:

“If the practice prevailing in the immigration service were attended with the formality and regularity generally characterizing judicial procedure in courts of law, it might therefore very properly be held, as argued by counsel for the Government, that the applicant himself is in a measure to blame for the failure of the record to disclose the fact of the question whether the comparison was made by an inspector referee the entire hearing in such a case is informal and radically different from ordinary judicial procedure. A very loose practice seems to prevail as to the time and manner of making such comparison and of bringing the results to the attention of the reviewing officer. * * * The applicant was represented by counsel familiar with the practice in the department, and his testimony leaves no doubt that he was unaware of any distinction between cases where the comparison is made by an inspector and those made by the commissioner or his law officer.”

In the case at bar it appears that a delay in the case was desired so that the alien might have the opinion, advice and assistance of her counsel in this matter, and those benefits undoubtedly would have consisted in a further showing to counterbalance the effect of the evidence given by these two witnesses. Inspector Ainsworth conducting this hearing undoubtedly understood that a request for a

continuance was before him as is evidenced by his decision in the matter, in which he stated (Tran. 42):

“I do not feel justified in holding it open any more, and will send the record as it appears to Washington, with the protest made by you being part of it.”

In this connection we submit that the responsibility of conducting a fair hearing in a case of this kind rests upon the Government, and the regulation specifically provides in rule 22, subdivision 4, section b, that if evidence is offered by the Government after counsel has been accorded the alien, that *she may have an opportunity to offer evidence to meet any evidence thereafter presented by the Government.* It was incumbent upon the inspector to afford a fair hearing, and to afford the alien an opportunity to meet this evidence which it is admitted and conceded he then for the first time presented to the attention of the alien, and his failure to obey the plain mandate of the rule deprived the alien of a fair hearing. It is no defense to say that these papers were formally in the record, because the record in this hearing shows that on October 10th that the record was given to the attorney for the alien, and that at that time this evidence was not contained in the case. If the Government thereafter presented any additional evidence, the obligation rested upon them to make known that fact to the alien and her attorney, and their failure to do so, and in withholding the said evidence until the

final hearing, and then affording no opportunity to meet the same, they deprived the alien of any opportunity to offset this evidence which the Government at the last moment presented in this case before transmitting the record to the Department at Washington. We submit that the hearing accorded as outlined herein is nothing but the semblance of a hearing, and has not accorded the alien a fair opportunity to meet the charge against her.

The final protest of the attorney for the alien upon this matter is comprehensive, and covered this point, and is as follows:

“We desire to protest at this limitation upon the right of counsel and this abridgment on the ability of the defendant to properly present a full and adequate defense.”

THIRD.

“The Court erred, in holding that it was not an abuse of discretion, and did not deprive the alien of a fair hearing, for the Commissioner of Immigration, after the close of the Government case against the said alien, the petitioner herein, to submit evidence to the department detrimental to the said alien, the said petitioner herein, which said detrimental evidence had been previously withheld from the said alien, the petitioner herein, and no opportunity at all afforded her at any time of meeting, or answering, the said evidence, which was clandestinely forwarded to the Secretary of Labor, and in so abridging and limiting the right of the counsel of the alien, as to prevent counsel from ascertaining all the evidence submitted

against the said alien, the petitioner herein; all as more particularly alleged in the third specification of unfairness contained in the petition on file herein." (Tran. 8 and 9.)

The above specification has to do with the transmitting to the department of evidence against the appellant which has not been submitted to the appellant, and which she has no opportunity of answering. The trial Court in its opinion upon this matter decided that this point was well taken, and only held against it upon the question of procedure, the decision of the Court upon that point being as follows:

"It is averred on information and belief that after the close of the case the Inspector submitted evidence detrimental to petitioner which she has never seen. If this be true, of course the hearing was unfair. But in proceedings like this, an averment of this nature is easily made, and I am not disposed to give it any attention, unless the reason for the belief, and the nature and the source of the information is set out, so that the Court may say whether there is any reasonable ground for the belief, or any basis for the information."

We desire to answer this by stating that we are not required to set forth in our pleading matters of evidence, but are only required to allege the ultimate fact, and that obviously the source of our information or the reason for our belief are questions of evidence as is also the question as to whether or not they did send such evidence to the department. We submit that good pleading re-

quires that such matters should be affirmatively alleged upon information and belief, and that when we have done that we have performed all that the law requires. It is thereafter incumbent upon the respondent to either deny or admit the allegation. The verification to the petition swears to the truth of everything contained in the petition excepting as to those matters alleged on information and belief, and as to those matters, she believes them to be true. We submit that upon this point the petition is sufficient to call upon the Government to make answer thereto.

There are not any adjudicated cases directly upon this point upon deportation cases, but the same principle is involved in incoming cases, save that in incoming cases the importance to the applicant for admission is that all the evidence submitted upon his behalf should be sent to the department while in deportation cases the importance to the person proceeded against is that he should see all the evidence presented against him, so that he might have an opportunity of answering the same. In cases of admission upon this point the Courts have already so adjudicated. Reference is made to the case of *In re Can Pon*, 168 Fed. 479, ^{decided} ~~referred~~ by this Honorable Court, in which the Court held, Judge Gilbert speaking (page 484):

“But the applicant upon his appeal from the decision of the local officer was entitled to the benefit of all the material evidence which was before the inspector. To withhold any thereof, and to exclude it from the record on the ap-

peal was to deny him the right of appeal which the statute gives him. The testimony of a witness which was on the whole favorable to the applicant's contention was by inadvertence omitted from the record on appeal, and was not considered on the hearing thereof. It makes no difference that such evidence was taken at the instance of the inspector, and that it never came to the attention of the applicant or his counsel; it was a portion of the evidence taken by the inspector as an officer of the government, whose duty it was to act impartially and to ascertain the truth as to the question at issue. A portion of the testimony so omitted was direct evidence to the effect that the applicant was born within the United States. The inspector discredited it, but the applicant was entitled to the benefit of it on the appeal. It is no answer to this to say that portions of the testimony of that witness tended to contradict certain statements of Look Wing. Having been denied the benefit of all the testimony taken upon the question of his right of admission to the United States, the applicant has been deprived of the right of appeal which the statute confers upon him, and he may, therefore, upon habeas corpus, test the legality of his imprisonment."

There is a dissenting opinion written by Judge Morrow, which, however, dissents solely upon the question of jurisdiction, and we desire to quote as follows from that portion of the decision which might be classed as concurring with the majority opinion (*italics ours*) (page 487):

"In my opinion, all there is in this case is the question whether the method of procedure followed by the officers was due process of law. With respect to the omission of testimony from

the record on appeal to the Secretary of Commerce and Labor referred to in the opinion of the majority of the court, it is sufficient to say that this defect in the procedure was a lack of due process of law, and by reason of that fact, the omission of the testimony became known only by the proceedings in court upon the petition for a writ of habeas corpus. *Without such proceeding this testimony might never have come to the knowledge of the petitioner or his attorney.* A citizen of the United States returning from a foreign country and claiming the right to come into the United States as such citizen may never know under this procedure the testimony produced against him, may never have an opportunity to meet it, or to cross-examine the witness who may testify against him. Is this due process of law?"

FOURTH.

"The Court erred in holding that it was not an abuse of discretion, and did not deprive the alien, the petitioner herein, of a fair hearing for the immigration authorities to submit their evidence against the alien, the petitioner herein, in the form of oral examination from the witnesses prior to according the alien the right of an attorney and to thereafter present the evidence from the Government witnesses in the form of ex parte affidavits, thus preventing and depriving the alien, the petitioner herein, of any opportunity of being confronted with any witnesses being presented against her, and depriving her of any and all opportunity to submit evidence of said Government witnesses upon her own behalf; all as more particularly alleged in the fourth specification of unfairness contained in the petition on file herein." (Tran. 9 and 10.)

Upon this point we desire to submit that all of the matters submitted under the foregoing three points might really be considered as amplifications of different matters that might arise under this specification, and it is only in addition thereto that we need to submit some general observations and decisions. The Constitution of the United States of America provides that no person shall be charged with a crime or a misdemeanor, no matter how small, save upon the presentment of an indictment by a Grand Jury, and that he may not be convicted until after he has had a trial before a jury. The organic law of the United States further requires that in civil matters, where the controversy in dispute is even of the value of only a few dollars, that the right of jury trial shall exist. Is it possible or conceivable that the Congress of the United States, having before it the mandate of the Constitution, that litigants would not be compelled to submit such matters to be determined solely by a judge, if they desired a jury, that Congress should have given to a vast body of Immigration Inspectors such tremendous powers that they could themselves virtually determine matters of far greater importance in their consequence to the parties proceeded against than are many criminal prosecutions or civil suits, with such a small check upon the Immigration Inspector that he might by his conduct deprive the aliens of their right of residence in this country by devising a class of procedure which virtually precludes and prevents them from making any ade-

quate showing at all, or of attacking satisfactorily the showing made by the Government? When we take into consideration that the Supreme Court of the United States has decided in the case of *Frick v. Lewis*, supra, and more recently in the case of *Lapina v. Williams*, that the residence of an alien might be terminated, no matter how many years it had continued and also in the case of *How Moy v. North*, 223 U. S. 717, in which certiorari was refused by that Court, showing that these Immigration Inspectors might even determine the great question of citizenship; and I ask in view of these great matters that are entrusted to them, whether it is conceivable that they are to become and be a law unto themselves in proceedings of this kind? I expect that stress will be laid upon certain decisions of the Courts which arose from cases of *admission* in contra-distinction of those of *deportation*, and for that reason I desire to submit further observations upon that point. It should not take much to convince or show one that cases of admission and deportation stand upon an entirely different footing. The Chinese Restriction Acts themselves provide that in cases of admission the executive administrative officers shall have jurisdiction, but expressly provide in section 12 of the Act of May 6th, 1882, and section 13 of the Act of September 13, 1888, that deportation cases shall be tried before a justice, judge or commissioner, in other words, a judicial officer of the Government, where judicial procedure prevails and where a complete right of

counsel is accorded. It is of interest to note, therefore, when considering these different Chinese decisions, that the Chinese Restriction Acts themselves make this distinction: The right of a Chinese person to enter the United States was a summary proceeding and swift executive action was contemplated. It would hardly be a reasonable regulation in an admission case, in fact it would defeat the purpose of the law, if a complete right of counsel existed in an admission case, where witnesses must be examined at different places and examination conducted at widely divergent points. Would it be incumbent upon the Government to take an applicant for admission at the port of San Francisco back to the city of Boston or New York so that he might there be confronted with the witnesses there testifying on the Government's behalf? Certainly such a requirement would lead to absurd results. In an admission case the applicant is not a defendant, no charge is brought against him, nor is he being proceeded against, but he is simply asked to state the grounds of his admission and what witnesses can testify for him, and then the witnesses are examined; whereas in a deportation case an entirely different situation confronts us. There the person is actually a defendant; there is a specific charge made against him which he must meet and he is being proceeded against. The very nature of these charges show that the evidence would almost invariably be close at hand to the place of the trial, and not scattered all over the length and breadth

of the country, as in admission cases. In all admission cases the applicants are held at the various ports of entry while their evidence is being examined at their former place of residence, which may be thousands of miles away, while in arrest cases the warrant is issued and the person tried in the locality where it is charged the offense took place. Another element which must not be lost sight of is the fact that admission and exclusion cases are dealt with under entirely different sets of regulations, and these regulations in turn have different statutory authority. In an admission case the applicant denied at the port of entry has a right of appeal in which he may inspect the entire record on which he has been denied and ascertain therefrom in what measure the evidence he has submitted has been found wanting, and he then has the right of submitting further evidence upon appeal to overcome these divergencies; he has the right to see the report on the said evidence and may thus know whether his evidence is even then sufficient, and if it is not, he still has the right to submit further evidence, until either the statutory requirement has been met or his supply of evidence exhausted; whereas in a deportation case the person proceeded against and his counsel are both prevented from seeing the reports and the conclusions of the examining inspector, and also the opinion of the Secretary or the different reviewing officers under the Secretary, and are only advised as to the ultimate decision. It is readily seen that what would

be a reasonable regulation in an admission case would be a very unreasonable regulation in a deportation case, and it was the recognition of this fact that different sets of regulations exist and a different mode and method of procedure is provided and established. In support of this contention we direct the Court's attention to the case of *Davidson v. New Orleans*, 96 U. S. 97, 107, wherein it is said:

“If found to be suitable or admissible in the special case it will be adjudged to be ‘due process of law’, but if found to be arbitrary, oppressive and unjust, it may be declared to be not ‘due process of law’.”

A further reason for this distinction is necessitated when we consider that the Immigration officer conducting the hearing in a deportation case usually acts as a “informer, arresting officer, inquisitor and judge”. This language just quoted is from *U. S. v. Williams*, 185 Fed. 599, *supra*. In this connection it might be well to note that in the case of *Hangs v. Whitfield*, 209 Fed. 675, *supra*, the Court also comments upon the inspector “who acted as prosecutor and judge upon such hearing”, while even in the case at bar, by referring to the record of the hearing annexed to the petition we find that Immigration Inspector-In-Charge Ainsworth is the arresting officer, prosecuting examiner and also the judge of that part of the hearing. (See caption to examination of each witness: Testimony Choy Gum, Tran. 15; Leong Toe, Tran. 17; Ton Yook Lou, Tran. 20.) When officers so vitally

interested are permitted to conduct these hearings, it is quite essential that the defendant should have a "substantial" right of counsel, and not a mere semblance of protection. In *U. S. v. Williams*, supra, page 603, the court, commenting upon the Immigration Inspector and the police officer, states as follows:

"Who had any interest in dissuading them except Tedesco and Nicolay? Nicolay had originally made the charge, and Tedesco had preferred it. They both had the ordinary detective's belief in guilt and zeal for conviction. Tedesco appears at every turn in the transaction resisting all attempts of any counsel to see the aliens."

In the case of *United States v. Redfern*, 180 Fed. 500 there is an interesting part of the decision to which we desire to direct your attention, only first citing a part of the syllabus:

"Held that, where there were only three immigration inspectors at a port where an alien attempted to land, the inspector who had examined her and had denied her right to enter was not competent to sit on a board consisting of three inspectors, of which such inspector was one, was illegal and without jurisdiction."

To lead up to and explain a part of the decision quoted, as follows:

"It is fundamental in American jurisprudence that every person is entitled to a fair trial by an impartial tribunal, and a board of special inquiry constituted as in this case is at least open to suspicion. I do not believe the law contemplates that the inspector who makes

the preliminary examination shall serve on the board of special inquiry, and I must hold in this case that the board which denied to petitioner the right to land was illegal and without power." * * *

"The writ will be made absolute, and the relator will be discharged from custody."

This honorable Court's attention is further directed to the case of *United States v. Sibray*, 178 Fed. 144. Judge Orr, speaking at page 149, states:

"After the arrest three separate hearings were had by the immigration inspector at which testimony was taken. At the first only was the relator present. Of the second and third he had no notice, although at each a witness was sworn and examined. Upon the testimony thus taken the order of deportation was issued. It is clear that such proceedings were contrary to law. The act provides for the production of the alien at the hearing or hearings. It is fundamental procedure that witness and accused be brought face to face, and it is also fundamental that opportunity for cross-examination should be given. I am therefore of opinion that the hearings were not held according to law."

This case is immediately followed by another case of the same title, 178 Fed. 150, in which Judge Orr, speaking at page 151, states:

"Second. As in the *Huber* case, after the arrest there were three hearings, of two of which the relator had no notice and was not given an opportunity of being present, although at each of said hearings a witness was sworn and examined. For these reasons the hearings were not held according to law."

A very recent case and one which contains an appropriate finding, is the case of *U. S. v. Redfern*, 210 Fed. Rep. 548, Foster, District Judge, wherein, on page 550 thereof, it is held:

“(4) Under the provisions of the immigration act, these Chinese, though unlawfully in the country, could not be deported after three years. Disregarding the claim of three of them to be American citizens, from their own testimony all of them have been in the United States more than three years, and, while the immigration officers and Secretary of Labor perhaps might arbitrarily disregard this sworn testimony, still if that is eliminated from the case, there is nothing left. Congress has indeed vested the immigration officers with enormous power, subject to no check save their own consciences, but in granting them discretion to arrest and deport any person charged with being an alien and unlawfully in the country, I cannot believe that it was ever intended that they could do so arbitrarily, and without some evidence upon which to base their decision.

“Under ordinary circumstances, where the record shows clearly an alien is unlawfully in the country, but the warrant of deportation is defective, the Department of Labor should doubtless be afforded an opportunity of correcting its mistake, but in this case there would seem to be no good reason for so doing as the men can be rearrested under the provisions of the Chinese exclusion laws. And in that event they will have an opportunity of a trial in court, *where they may be represented by counsel in fact as well as in theory*, and will have compulsory process to obtain witnesses in their own behalf.

“The writs will be made absolute, and the prisoners discharged from custody.”

It is regrettable that on the appeal taken in these two ~~last mentioned~~ ^{preceeding the last mentioned cases} that the Circuit Court of Appeals did not pass upon the particular points here relied upon. It seems that there were three cases and they were all dismissed for the following reasons, citing Clay, Circuit Judge, 185 Fed., page 404:

“The same order is made in the other cases named in the caption, to wit, Nos. 70 and 71; as, in both of them it appears by the return of the respondent that the relator was not in his custody or control, but was out on bail before and at the time of the service of the writ. The records in these two cases seem to disclose a situation of great hardship, as to both relators, and we venture to express the hope that, though the exercise of the discretion of the Secretary of Commerce and Labor and his subordinates, so far as it is authorized by law, is not subject to review in the courts, there may be found some way in which this hardship may in some degree be mitigated in the further exercise of that discretion.”

Upon the question of examination or cross-examination of witnesses we desire to state that it is noteworthy that in the two cases of this character which have been before the Supreme Court, first, that of Low Wah Suey v. Backus, *supra*, and second, that of Zakonaite v. Wolf, 226 U. S. 272, in the cases sought to be reviewed by the Court, the right of examination and cross-examination was freely accorded to both parties to the controversy, thus showing that while the precise matter was not raised as a point before the Court, the

No. 2475

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

CHOY GUM, sometimes referred to as
Lo KING,

Appellant,

vs.

SAMUEL W. BACKUS, as Commissioner
of Immigration at the Port of San
Francisco,

Appellee.

BRIEF FOR APPELLEE.

JOHN W. PRESTON,

United States Attorney,

WALTER E. HETTMAN,

Assistant United States Attorney,

Attorneys for Appellee.

Filed this.....day of January, 1915.

Filed

FRANK D. MONCKTON, Clerk.

By.....JAN 21 1915.....Deputy Clerk.

F. D. Monckton.

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BRIEF FOR APPELLEE.

The Supreme Court has again and again laid down the rule that the courts will not, on a petition for a writ of habeas corpus, review the decision of the Secretary of Labor, unless

(1) There has been unfairness in the procedure hearings; or

(2) There is not at least some evidence upon which the Secretary of Labor might base his finding.

Approaching this case with a view to discussing both phases of the court's power, it will be necessary to chronologically set forth a brief statement of the facts.

Facts.

Since the statement of facts by counsel for the appellant is somewhat incomplete, the appellee wishes to make clear some of the circumstances which are all of record in this case.

The Secretary of Labor at Washington, D. C., decided the question of fact that this woman, Choy Gum, came to the United States on October 28th, 1908, under the name of Lo King, and was admitted into the country as the wife of a citizen.

At the hearings of the alien, just after her arrest by the immigration authorities, she testified that she had come into the United States at the age of two years, and had remained here ever since (Trans. 14); that she had been engaged, but owing to the death of her fiance, the marriage had never taken place. Two experienced immigration officers, H. Edsell, Assistant Commissioner of Immigration, and F. H. Ainsworth, inspector, testified on October 10th, 1912, at a hearing given the alien Choy Gum, alias Lo King, at Angel Island, at which hearing her counsel, George A. McGowen was present, that they were firmly convinced that the said Choy Gum was the same person who entered the United States in 1908 as the wife of an alleged citizen of the United States (Trans. 36). At that hearing, Assistant Commissioner H. Edsell made the following statement:

“The woman now before me was brought to this station some days ago by her attorney wholly for the purpose of identification or of

comparision with the photograph in the records of Lo King, admitted at this port on October 23, 1908, ex. SS. 'China'. I compared her with said photograph and had no hesitancy in reaching the conclusion that she was the original of the 1032/231 (Lo King, alias Choy Gum) 10/10/12. photograph referred to. I held the photograph up so she could see it and pointed to it, and she nodded her head affirmatively, apparently intending to indicate to me that it was her photograph."

The inspector-in-charge, F. H. Ainsworth, in continuing the hearing (Trans. 37) on October 10th, 1912, in giving his conclusions on this point said:

"In my judgment, this woman is the one who was admitted as Lo King, wife of a native, Hom King Fook, from the SS. 'China', October 23, 1908, and whose photograph is attached to the record. At this point, Attorney Geo. A. McGowan, who represents the alien, appears and will make any statement he wishes to make in behalf of the alien, or ask her any questions he thinks pertinent."

When the immigration record in the case of said alien, Choy Gum, was finally completed, including all the evidence submitted on behalf of the said alien by her counsel, and was forwarded to the Secretary of Labor at Washington, D. C., for his decision, the Acting Secretary of Labor, Benjamin S. Cable, issued a warrant of deportation for said Choy Gum on the 15th day of November, 1912 (Trans. 52), in which, among other provisions, the following charge and finding appeared:

"WHEREAS, from proofs submitted to me, after due hearing before Immigrant Inspector F. H.

Ainsworth, held at Angel Island, California, I have become satisfied that the alien, Choy Gum, alias Lo King, who landed at the port of San Francisco, Cal., ex SS. 'China' on the 23d day of October, 1908, has been found in the United States in violation of the Act of Congress approved February 20, 1907, amended by the Act approved March 25, 1910, to wit:

“That the said alien is a prostitute and has been found an inmate of a house of prostitution and practicing prostitution subsequent to her entry into the United States, and may be deported in accordance therewith.”

The immigration record of the case of the alien Choy Gum further shows that an application for warrants of arrest for Choy Gum and another alien, Leong Toe, was made by the Commissioner of Immigration at Angel Island, Cal., on September 20th, 1912. On the night of September 19th, 1912, the police force of San Francisco, under instructions from Chief of Police White, acting on their own initiative, and not upon the instigation or request of the Immigration Bureau, raided a Chinese house of prostitution at No. 5 St. Louis Alley in San Francisco, and took into custody three Chinese women, Choy Gum, Leong Toe and Ton Yook Lan, and a Chinese youth who gave the name of Wong Go. Wong Go testified that he was 24 years of age; that he was a resident of Stockton, California; that he came to the United States about the year 1902 and was at that time duly landed as the son of a domiciled Chinese merchant to work in his father's store in Stockton, California; that since his admission into the United States he had been employed at

periods in this store and had looked after the partnership interests of his father, who had since returned to China. This statement and testimony of Wong Go having been corroborated by the immigration records he was accordingly released from custody.

The Chinese woman Ton Yook Lan, who was taken into custody with the two other women, testified that she was a native of the United States, having been born in San Francisco (Trans. 19). Upon an investigation and consideration of her claims, she was also released.

The two alien women, Choy Gum and Leong Toe, were then placed under arrest under and by virtue of the warrants of arrest emanating from the Secretary of Labor. Each was charged with being an alien prostitute found practicing prostitution subsequent to her entry into the United States, and each was ordered to be held in custody to show cause why she should not be deported in conformity with the law. The case of Leong Toe was finally submitted to the Secretary of Labor and she was duly ordered deported by a warrant of deportation. Upon a petition for a writ of habeas corpus to the District Court, No. 15,349, Judge Van Fleet sustained the demurrer of the government, and the petitioner appealed to the Supreme Court of the United States. The case was eventually dismissed on the motion of counsel for appellant, and Leong Toe was finally deported to China.

The alien, Choy Gum, was arraigned under a warrant of arrest dated September 26th, 1912. Upon this she was given a hearing, and accorded every opportunity under the immigration rules and regulations to present any and all evidence in her behalf. On the 15th of October, 1912, the Secretary of Labor issued the warrant of deportation.

Counsel for the alien then petitioned the United States District Court (Court No. 15,345) for a writ of habeas corpus, and the woman was admitted to bail pending the termination of these proceedings. On the 19th of December, 1912, Judge Van Fleet sustained the demurrer and the petition upon which the petitioner gave notice of appeal to the Supreme Court of the United States.

On June 2nd, 1914, the office of the United States Attorney for the Northern District of California received a communication from the Department of Justice at Washington, D. C., enclosing a copy of the mandate from the Supreme Court of the United States, dismissing the appeal upon the motion of the appellant's counsel. The mandate now on file in the District Court for the Northern District of California shows that the order of dismissal was made on March 16th, 1914, but that it was not executed and approved until May 21st, 1914. Petitioner's counsel was not content to abide by his dismissal of the case in the Supreme Court, but immediately surrendered the alien Choy Gum to the custody of the immigration officials at Angel Island, California, and filed a new petition for a writ of

habeas corpus on April 16th, 1914 (Court Record No. 15641), and again secured the release of Choy Gum on bond. Here was a situation of a new petition filed after the order of dismissal, but before the mandate of the Supreme Court of the United States had been executed and filed, and fully a month and a half before the certified copy of the mandate of the United States Supreme Court dismissing the appeal was received and spread upon the minutes of the District Court for the Northern District of California.

The new petition for a writ of habeas corpus which is now before this court was based upon the same record and set forth the same facts and contentions as the former petition which had been before the Supreme Court. The matter again came on for hearing upon a demurrer to the petition, and Judge Dooling sustained the demurrer and denied the writ. On the 10th day of August, 1914, the matter was appealed to this court.

The above facts are all matters of record of the District Court for the Northern District of California, and of the Supreme Court of the United States, and show that this alien woman has been out on bail during all the court proceedings, and that there has been no means of deporting her, nor of restraining her from continuing her practice of prostitution if she was so inclined.

The official docket and the files of the United States District Court for the Northern District of

California show, among others, the following entries:

In the matter of

Choy Gum, on habeas corpus. No. 15,345.

Nov. 29, 1912. Petition filed.

Dec. 19, 1912. Demurrer sustained.

June 24, 1913. Citation on appeal to U. S. Supreme Court.

Mar. 16, 1914. Order dismissing appeal in U. S. Supreme Court.

May 21, 1914. Order executed.

June 2, 1914. Mandate from Supreme Court filed in District Court.

In the matter of

Choy Gum, on habeas corpus. No. 15,641.

April 16, 1914. Petition filed.

April 27, 1914. Order admitting to bail.

July 1, 1914. Demurrer sustained.

Aug. 10, 1914. Citation to Circuit Court of Appeals.

Counsel for petitioner in his brief to this court has set forth four assignments of error by the District Court and has discussed each assignment separately. In following the assignments in the order arranged by the appellant, the government will deal with each alleged error with reference to the two propositions:

(a) Were the hearings or immigration proceedings in any way unfair? and

(b) Was there an abuse of discretion on the part of the Secretary of Labor in issuing a warrant of deportation upon the evidence before him?

FIRST:

The first assignment of error is quoted on page 27 of appellant's brief, and the purport of that paragraph is that certain witnesses, Leong Toe, Ton Yook Lan and Wong Go, were prejudiced and biased in favor of the government, and for that reason the alien Choy Gum was denied a fair hearing. It is assigned that the lower court, in holding that the admission of this testimony into the record was in no way unfair, was error. Counsel says that the alien has been "very much aggrieved, injured and oppressed" because the immigration officials refused to believe her statements that she entered the United States over twenty years ago, and because they identified her as Lo King, who entered the United States on the SS. "China" on the 23rd day of October, 1908, as the wife of a citizen.

The Secretary of Labor, upon the evidence presented, made the finding that Choy Gum and Lo King were identical. His finding of fact is final. He based his conclusion upon the evidence which consisted of the opinions (after comparison of the alien with a photograph of Lo King) of two of his

experienced officers, Mr. H. Edsell, Assistant Commissioner, and Mr. F. H. Ainsworth, Inspector, and the entire immigration record, together with the photographs of the alien and the person known as Lo King, all of which were before him when he rendered his decision.

Counsel further claims that it was an abuse of discretion for the Secretary of Labor to rule that Lo King and Choy Gum were one and the same person, because no Chinese witnesses were produced to substantiate this fact. However, it should be remembered that only Chinese persons would know that Choy Gum and Lo King were one and the same person, and it is the experience of the immigration officials that it is virtually impossible to get Chinese to testify against each other in immigration proceedings. This is true not only because they feel aggrieved at the immigration laws which they believe single out their race for exclusion from this country, but they are not disposed to testify in each other's behalf, because they run great risks of personal injuries, or even of losing their lives—especially in the case of a slave woman—should they testify against her or her owners.

With the statement of counsel for alien that the witnesses Wong Go and Ton Yook Lan made self-serving declarations in testifying, we cannot agree. Counsel further states that these witnesses testified against Choy Gum in order to extricate themselves, and intimates that their declarations were false because of their self-interest. A perusal of the

testimony shows that these witnesses were not held for any offense, nor for deportation, and that no charges were ever made against them. It will further be seen that they endeavored to shield the alien Choy Gum, and that their statements regarding her acts of prostitution were most reluctantly given. There is nothing in the immigration record which shows that there were any promises of immunity made or that these witnesses were coerced in any way. In spite of the circumstances of Ton Yook Lan's case, even though she admitted her life of prostitution, the government was of the opinion, after an investigation of her claims of citizenship, that she had been born in the United States.

The prosecution of Choy Gum's deportation had nothing whatsoever to do with the case of Wong Go. Furthermore, at that time the government had not even attempted to test the policy of deporting a merchant's son found laboring in the United States, and Wong Go was not shown to have done anything which would forfeit his exempt status as a merchant's son.

Appellant further states that as a point of unfairness, counsel for the alien did not have an opportunity to cross-examine the witnesses called at the hearing of the alien. Neither the law, nor the Immigration Rules and Regulations provide that an alien or counsel shall have the right of cross-examination, especially where affidavits have been filed on behalf of the government. Rule 22 of the Immigration Rules and Regulations, which is sub-

stantially quoted on page 24 of appellant's brief, does not accord to the alien or his counsel the right of cross-examination. Under that rule counsel may, during the course of the proceedings, be allowed to inspect the warrant of arrest and all the evidence upon which it is based, and at such stage of the proceedings as the inspector in charge before whom the proceedings are held "shall deem proper", he shall advise the alien that he may thereafter be represented by counsel. This rule has been affirmed as being the law, and has been most emphatically interpreted in the case of

Low Wah Suey v. Backus, 225 U. S. 460.

Counsel, on page 31 of his brief, quotes a portion from that opinion, but it is regretted that he has failed to draw attention to that part of Judge Holmes' decision which defines rule 22-4B on the point of interference by counsel in an immigration hearing. It is, therefore, set forth as follows:

"It is further alleged that Li A. Sim was refused the right to be represented by counsel during all stages of the preliminary proceedings, and was examined without the presence of her counsel and against her will by the immigration officer at the port of San Francisco, and before she had been advised of her right to counsel, and before she was given an opportunity of securing bail; and that afterwards an examination was conducted by the immigration officer, acting under the orders of the Commissioner of Immigration, at which *she was requested by the immigration inspector against her will and without the presence of counsel, who was refused permission to be present, and*

that at certain stages of the proceedings she was refused the right to consult with counsel. This objection, in substance, is that under examination before the inspection officer, at first she had no counsel. *Such an examination is within the authority of the statute, and it is not denied that at subsequent stages of the proceedings and before the hearing was closed or the orders were made she had the assistance and advice of counsel."*

* * * * *

"It is alleged that the rules of the Secretary of Commerce and Labor are arbitrary and illegal, particularly certain sections of rule 35. From these rules, it appears that, while provision is made for an examination in the absence of counsel, it is provided that a hearing shall be had at which the alien shall have full opportunity to show cause why he should not be deported, and that, *at such stage of the proceedings as the person before whom the hearing is held shall deem proper, the alien shall be apprised that he may thereafter be represented by counsel*, who shall be permitted to be present at the further conduct of the hearing, to inspect and make a copy of the record of the hearing so far as it has proceeded, and to meet any evidence that theretofore has been or may thereafter be presented by the government."

A reading of this whole Low Wah Suey case will show how fairly, clearly and liberally, the Supreme Court construes the powers given by Congress to the immigration officials, and that the courts are adverse to interfering with the hearings of the Immigration Bureau where such proceedings are conducted in accordance with the rules.

Judge Dietrich, sitting in the District Court for the Northern District of California, recently decided the case of

Ex parte Garcia, 205 Fed. 53.

In his opinion he enters into a most thorough discussion of the privileges given under rule 22, subd. 4B, of the Immigration Rules and Regulations, and holds that the right of cross-examination is not accorded to the alien or his counsel.

“Was the failure of the inspector to give notice to petitioner’s counsel of his intention to take the last group of affidavits a breach of this provision? Counsel has the right ‘to be present during the further conduct of the hearing’, and the petitioner contends that this privilege includes the right to be present at the taking of affidavits; but, as already pointed out, the mere presence of counsel while the government is taking affidavits would avail nothing. The only substantial right would be that of cross-examination. The term ‘hearing’ may or may not have been intended to cover the taking of affidavits, and in the light of the practical construction that has been placed upon the rule it should be held, I think, that it was not intended to go to that extent. *It is significant that, while certain privileges of counsel are enumerated, cross-examination is not one of them. Evidence may be offered to rebut evidence produced by the government, but there is no suggestion of the right to cross-examine. Apparently it was contemplated that evidence would be produced by both sides in the form of affidavits, and, therefore, no provision was made for cross-examination.*”

That Judge Dodge of the District Court of Massachusetts has made a careful study of this phase

of the immigration laws, is indeed evident from his masterful opinion in the case of

In re Jem Yuen, 188 Fed. 350,

in which he clearly presents the requisites of a fair hearing before the Immigration Bureau. He does not even intimate that alien's counsel shall be accorded the privileges of cross-examination, as is the natural right of any person in a criminal trial.

"It is well settled that officers of the government, to whom the determination of questions of this kind is entrusted under statutes like those governing these proceedings, are not bound by the rules of criminal procedure, nor by rules of evidence applied in courts. It is not enough for a review of their decision on habeas corpus that there was no sworn testimony, or no record of the testimony or of the decision. No formal complaint or pleadings are required. *The alien's opportunity to be heard need not be upon any regular set occasion, nor according to the forms of judicial procedure; it may be such as will secure the prompt, vigorous action contemplated by Congress and appropriate to the nature of the case.* See *Nishimura Ekiu v. United States*, 142 U. S. 651, 663, 12 Sup. Ct. 336, 35 L. Ed. 1146; *Fong Yue Ting v. United States*, 149 U. S. 698, 729, 13 Sup. Ct. 1016, 37 L. Ed. 905; *The Japanese Immigrant Case*, 189 U. S. 86, 101, 23 Sup. Ct. 611, 47 L. Ed. 721."

In support of the contention that the alien should be accorded the right of cross-examination, counsel for appellant has cited, with much comment, the case of *Hanges v. Whitfield*, 209 Fed. 675, and lays great stress on the statements therein set forth.

That Judge Reed's opinion cannot harmonize with Judge Dietrich's and Judge Dodge's rulings, is very evident. Moreover, the case of *Hanges v. Whitfield* is now on appeal, and it is a mooted question whether this ruling will stand when it reaches the appellate court. It is not the purpose of this brief to endeavor, or even attempt, if such a thing were possible, to overrule Judge Reed in his opinion in the *Hanges* case, but exception must certainly be taken to his apparent confusion of an immigration hearing with a judicial trial or a criminal prosecution. It should be noted that he can find no immigration decision to support the following statement in his opinion in that case:

"The right of cross-examination is one of the principal, as it is one of the surest, tests which the law affords for the ascertainment of the truth in all disputed matters of fact; and it is indispensable in all *judicial* proceedings in this country, *civil* or *criminal*, that *ex parte* testimony, even though given under the solemnity of a legal oath or affirmation that it is true, taken in the absence of and without opportunity at some stage of the proceedings to the party against whom it is proposed to be used to cross-examine the witnesses giving such testimony, cannot rightly be used against him. 1 Greenl. Ev. (16th Ed.), sec. 447; 2 Wigmore on Ev., secs. 1361, 1365; *Interstate Commerce Commission v. Louisville & N. R. Co.*, 227 U. S. 88, 93, 33 Sup. Ct. 185, 57 L. Ed. 431."

The higher courts have so many times decided that an immigration hearing is a summary proceeding, that it has become an elementary principle.

Furthermore, a departmental investigation before an Immigration Bureau is not a “*judicial*” proceeding, nor is it a “*civil*” nor a “*criminal*” trial. It is not a punishment for any crime. It is merely an *inquiry into the status of an alien* in which the Immigration Bureau acts entirely within its jurisdiction and prerogative in granting a summary hearing.

A recent Supreme Court decision was most pointed on this phase of immigration proceedings. The case involving a criminal prosecution and a deportation proceeding which has been so many times quoted by petitioners since its decision in the District Court, has recently been reversed by the Circuit Court of Appeals and the Supreme Court, and in sustaining the Immigration Bureau, the Supreme Court of the United States has thrown the proverbial monkey wrench into the gearings of the machinery of petitioners for writs of habeas corpus, in that it has settled many points most decisively. This is the case of

Frick v. Lewis, 233 U. S. 291.

This case holds that the result of a criminal prosecution has no bearing on the decision of the Secretary of Labor.

“We agree with the Circuit Court of Appeals that the verdict and judgment acquitting petitioner under the indictment does not render the present controversy *res judicata*. The issue presented by the traverse of the indictment was not identical with the matter determined by the Secretary of Commerce and Labor. And,

besides, *the acquittal under the indictment was not equivalent to an affirmative finding of innocence, but merely to an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused. The distinction between a criminal prosecution and an administrative inquiry by an Executive Department or subordinate officers thereof has been often pointed out. Zakonaite v. Wolf, 226 U. S. 272, 275, and cases cited; Williams v. United States, 186 Fed. Rep. 479."*

The case of

Zakonaite v. Wolf, 226 U. S. 272, and authorities there cited, should be convincing to Judge Reed that his decision in Hanges v. Whitfield, *supra*, that the rules of evidence in a criminal prosecution have no application to a deportation proceeding.

"With respect to the second point little more need be said. It is entirely settled that the authority of Congress to prohibit aliens from coming within the United States, and to regulate their coming, includes authority to impose conditions upon the performance of which the continued liberty of the alien to reside within the bounds of this country may be made to depend; that a proceeding to enforce such regulations *is not a criminal prosecution within the meaning of the 5th and 6th Amendments*; that such an inquiry may be properly devolved upon an executive department or subordinate officials thereof, and that the findings of fact reached by such officials, after a fair though summary hearing, may constitutionally be made conclusive, as they are made by the provisions of the act in question. Fong Yue Ting v. U. S., 149 U. S. 398, 730, 31 L. Ed. 905, 919, 13 Sup.

Ct. Rep. 1016; *United States v. Zucker*, 161 U. S. 481, 40 L. Ed. 779, 16 Sup. Ct. Rep. 641; *Wong Wing v. United States*, 163 U. S. 228, 237, 41 L. Ed. 140, 143, 16 Sup. Ct. Rep. 977; *United States ex rel Turner v. Williams*, 194 U. S. 279, 289, 48 L. Ed. 979, 983, 24 Sup. Ct. Rep. 719; *Chin Yow v. United States*, 208 U. S. 8, 11, 52 L. Ed. 369, 28 Sup. Ct. Rep. 201; *Tang Tun v. Edsell*, 223 U. S. 673, 56 L. Ed. 606, 607, 32 Sup. Ct. Rep. 359; *Low Wah Suey v. Backus*, 225 U. S. 460, 468, 56 L. Ed. 1165, 1167, 32 Sup. Ct. Rep. 734."

In the case of

Bugajewitz v. Adams, 228 U. S. 584, 590,

it was also ruled that deportation is not a judicial proceeding, nor is it in the nature of a criminal prosecution.

"The attempt to reopen the constitutional question must fail. It is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country it deems hurtful. The determination *by facts that might constitute a crime under local law is not a conviction of crime, nor is the deportation a punishment; it is simply a refusal by the government to harbor persons whom it does not want.*"

The privilege of having counsel at the immigration hearing is not a matter of right, but it is a privilege conferred by the immigration rules. The purpose of allowing counsel to be present at these hearings, it is believed, could not be better expressed than is stated in an opinion of the Commissioner General of Immigration at Washington,

D. C., to the Commissioner of Immigration at San Francisco, California:

“Ordinarily the government’s case can be practically completed before counsel is allowed to intervene for any purpose; and when intervention is allowed, it is not for the purpose of cross-questioning and grilling the government’s agents, but to enable counsel to acquaint himself with the nature of the evidence already of record, and to offer any further evidence that he may be able to produce bearing upon the questions actually in issue.”

It is indeed difficult to reconcile these opinions, and the excerpts from the Supreme Court decisions, with the statements of Judge Reed in the case of *Hanges v. Whitfield*, *supra*, where he endeavors to say that a deportation proceeding is in the nature of a criminal trial.

On pages 39 and 40 of appellant’s brief, counsel has alleged that the witnesses Wong Go and Ton Yook Lan testified in the hope or promise of being restored to their liberty. Obviously this allegation is thrown in as a mere guess, and finds no support in the copy of the record in the transcript. This was not a hearing as to the question of whether or not either of these witnesses was subject to deportation. Whether Wong Go was a merchant’s son found laboring, or whether Ton Yook Lan had not established her nativity, are beside the mark. At that time Wong Go was employed in his father’s store in mercantile pursuits, and Ton Yook Lan’s claim of citizenship could not be refuted, and the

Immigration Service does not maintain a big drag-net to bring in every alien or citizen and deport them without even a suspicion of a reason therefor.

SECOND.

The second assignment of error is set forth on page 41 of appellant's brief and in substance alleges that the testimony of Arthur T. Layne and Dennis Bohle was taken at a hearing at which counsel for the alien was not present, and further that no opportunity was afforded to answer this testimony, and for that reason this is a point of unfairness.

The statement of appellant that the making of affidavits was the conducting of a hearing, is a mistake. The testimony of Layne and Bohle, if it may be called testimony, was simply in the form of affidavits (Trans. 50, 51), and was not in the nature of a hearing. They appeared before Wm. M. Gassaway, an immigrant inspector stationed at the Ferry Building in San Francisco, and swore to affidavits in which they stated that they assisted in the arrest of Choy Gum, and that the premises from which this alien woman was taken, were known to them to be a house of prostitution. There is a well-recognized difference in immigration proceedings between the making of affidavits and the taking of statements by question and answer. The making of an affidavit which is afterwards put into

the record of an immigration case, does not constitute a hearing under the interpretation of the Immigration Rules and Regulations. That these affidavits were sworn to on the 15th day of October, 1912, before an immigration official and were later incorporated into the immigration record in this alien's case, without counsel being present, was in no possible way unfair. A leading case directly in point on the using of ex parte affidavits in immigration proceedings, and a case which the government wishes to particularly call to the attention of this court, is

Ex parte Pouliot, 196 Fed. 437, 442,
which is quoted at page 43 of appellant's brief with an attempt by counsel to draw an imaginary distinction between that case and appellant's case. The only feature of counsel's distinction between these two cases is that it is an explanation which fails to explain.

In the case of Ex parte Garcia, supra, it is held that the taking of ex parte affidavits without the presence of alien's counsel, is not judicial error.

"A more serious criticism is that affidavits or ex parte depositions were taken without notice after the petitioner had employed counsel; but even here it is again to be said that if it be conceded that the entire hearing may be had upon affidavits the incident is without prejudicial error, for in the taking of affidavits by the government the presence of petitioner and his counsel could subserve no useful purpose. Affidavits are of necessity ex parte; there is no place for cross-examination."

The case of *Ex parte Ung King Ieng*, 213 Fed. 119, from which counsel for appellant attempts to get some comfort, is set forth on page 47 of his brief. Judge Dooling decided that case just prior to rendering his decision in appellant's case now before this court, and in making his later ruling had no reason, because of the great dissimilarity of the facts, to even refer to his decision in the case of *Ex parte Ung King Ieng*. In this last mentioned case there was an actual hearing at San Jose, California, at which witnesses were called by the Immigration Bureau, and were examined in the presence of the alien's attorney by question and answer, and the testimony was taken down by reporter. Alien's counsel in San Francisco had been notified to be present. When he appeared at San Jose and requested permission to ask a few questions of the government witnesses the inspector in charge refused to allow him to do so. That this was unfair and that Judge Dooling was correct in his decision, cannot be disputed, but had counsel quoted a portion of the paragraph just preceding that excerpt set out in his brief, he would have emphasized these words:

"There is no question here of the power of the immigration officers to compel the attendance of witnesses, for the witnesses were actually in attendance. There is no question here of presenting the case on *ex parte* affidavits, because that was not done."

The evidence received from Layne and Bohle was not at a hearing, but was through affidavits, and

certainly Judge Dooling is correct when he states in the case of Choy Gum that no right of cross-examination should have been allowed.

“The petition avers that on November 7th, the last day of the hearing, two affidavits of police officers were presented against petitioner, which affidavits were taken on October 15th, and that petitioner by her counsel requested an opportunity to cross-examine the said officers, as also an opportunity to meet the evidence contained in such affidavits, which requests were denied and the hearing immediately closed. *As to the first request, it has been held that evidence may be presented in the form of affidavits, and in such case I am of the opinion that the right to cross-examine does not exist.*”

(Trans. p. 56.)

The further allegation in the second assignment of error that the case was closed and the record sent on to the Secretary of Labor at Washington, D. C., before the petitioner had an opportunity to answer the charges in the record, is an argument in the nature of which counsel for appellant once characterized as a “false alarm”. A perusal of the record shows that counsel was given ample time to meet any evidence produced by the government, and that the dialogue between counsel and Immigration Inspector Ainsworth (Trans. 41, 43), shows plainly that counsel acquiesced in the closing of the record and in the transmittal of it to the Secretary of Labor, and stated that his assistant counsel in Washington, D. C., would represent the alien before the Secretary of Labor. Judge Dooling was clearly

of this view when he said in his decision (Trans. 56):

“The second request, that is for an opportunity to meet the evidence presented unexpectedly to petitioner on the last day of the hearing, although averred in the petition, does not appear from the record attached to have been made. The only request shown by the record was a request for an opportunity to cross-examine, no request for a continuance, or indeed for anything else having been made. As to these specifications of unfairness I am of the opinion that they are without legal merit.”

THIRD.

The statement in the petition (Trans. 8) that evidence of some kind, detrimental to petitioner, was put in the record and forwarded to the Secretary of Labor, without offering the alien or her counsel an opportunity of seeing or answering the same, is a statement made upon information and belief, and without any foundation. In Judge Dooling's opinion in this case he says (Trans. 57):

“But in proceedings like this, an averment of this nature is easily made, and I am not disposed to give it any attention, unless the reason for the belief, and the nature and source of the information is set out, so that the court may say whether there is any reasonable ground for the belief, or any basis for the information.”

This seems to cover the point exactly that this allegation in the petition was demurrable because of the insufficiency of the statement of facts.

That the inspector in charge of a case is in duty bound to send with the immigration record to the Secretary of Labor, a letter of transmission giving his views and a statement of the case, is a provision of rule 22, subd. 4 (c), of the Immigration Rules and Regulations. It is also provided that such a letter of transmission is a privileged communication between the Bureau of Immigration and the Secretary of Labor, and the failure to show such letter to the alien or his counsel, is not in any way prejudicial error. This was clearly decided in *Ex parte Garcia*, *supra*, as follows:

“The further contention, made by the petitioner, that his counsel was not given an opportunity to see the *recommendations* forwarded by the officer in charge to the Secretary of Commerce and Labor, is, I think, without merit. These recommendations do not constitute a decision, from which an appeal must or can be taken. The only adjudicating officer is the Secretary himself, and with the entire record of the facts open to his inspection and examination counsel for the petitioner may fully argue all questions in the brief which he is permitted to file and have forwarded to the Secretary. This argument may be made on the theory that the recommendations of the officer in charge will be adverse to the petitioner, and presumably it is made with such possibility in mind.”

FOURTH.

The fourth subdivision of appellant's brief according to his own statement, is simply an “ampli-

fication of the different matters" under other assignments of error. The attack upon the rules and regulations governing the immigration hearings on the ground that they are unconstitutional and unfair, is without merit. Congress has delegated to the Immigration Bureau such powers as are necessary for the enforcement of the immigration laws, and the Supreme Court of the United States has most emphatically decided that such powers are constitutional and proper. Without any further comment, the government cites the following Supreme Court decisions:

Ekiu v. United States, 142 U. S. 651;
Japanese Immigrant case, 189 U. S. 86;
Low Wah Suey v. Backus, 225 U. S. 460;
Zakonaite v. Wolf, 226 U. S. 272;
Bugajewitz v. Adams, 228 U. S. 584;
Frick v. Lewis, 232 U. S. 291.

The other point under this subdivision urged by counsel for appellant, is that in the proceedings in this case Immigrant Inspector in Charge, F. H. Ainsworth, conducted the raid, made the arrest and compiled the immigration record sent on to the Secretary of Labor. It is claimed that since he gathered the evidence before the arrest, he was prejudiced against the alien in his official zeal to have the woman deported. However, the facts are that the Chief of Police of San Francisco conducted

the raid without the assistance of the Immigration Bureau, and it was only after the aliëns were taken into custody that the Immigration Inspector Ainsworth was notified to take charge of them.

The argument that the alien was prevented from having a fair trial because this immigration inspector conducted the hearings and then sat in judgment and made recommendations in the case to the Secretary of Labor, is indeed shallow. A more complete and convincing answer to counsel's allegations could not be desired than the opinion in *Ex parte Kwan So*, 211 Fed. 772, and the government respectfully requests that that decision be read in conjunction with the case of Choy Gum.

The courts, by a long process of development and in a great many decisions, have firmly established the principle that an order of deportation in an immigration case will not be reviewed upon a petition for a writ of habeas corpus where the alien has had a fair hearing and where there is at least some evidence in the record to support the finding of the Secretary of Labor.

In this case, the government contends that the alien, Choy Gum, has had every opportunity to fairly present her defense against deportation, and further, that there is not only some evidence, but that there is ample and conclusive evidence that this alien woman was engaged in prostitution in the United States.

It is therefore earnestly requested that the opinion of the lower court be sustained.

Dated, San Francisco,
January 18, 1915.

Respectfully submitted,

JOHN W. PRESTON,

United States Attorney,

WALTER E. HETTMAN,

Assistant United States Attorney,

Attorneys for Appellee.

No. 2475

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHOY GUM, sometimes referred to as
Lo King,

Appellant,

vs.

SAMUEL W. BACKUS, as Commissioner
of Immigration at the Port of San
Francisco,

Appellee.

REPLY BRIEF FOR APPELLANT.

Filed

MAR 20 1915

F. D. MONCKTON

Clerk

GEO. A. MCGOWAN,
Attorney for Appellant.

Filed this.....day of March, 1915.

FRANK D. MONCKTON, *Clerk.*

By.....Deputy Clerk.

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REPLY BRIEF FOR APPELLANT.

The proceeding immediately before the Court is the propriety of the order of the lower Court in sustaining the demurrer of the respondent to the petition for a writ of habeas corpus filed on behalf of the detained person. As an elementary proposition it is of course conceded that for the purposes of the hearing upon the demurrer the allegations of fact contained in the petition are admitted and conceded to be true. If any of the allegations are in point of fact not true the opportunity for testing them would arise after a writ

of habeas corpus had been issued, and a return had been made thereto. The demurrer having been sustained by the lower Court, we are naturally upon this appeal confronted with a situation where for the purpose of this hearing the government must concede the truth of the allegations of fact contained in the petition, that is the significance and legal effect of their filing the demurrer. In the opening portion of the brief for the appellee additional matters not properly of record in this case have been called to the attention of the Court, and for that reason a request was made for permission to file a reply brief on behalf of the appellant so that these additional matters might be answered.

On pages four and five of the brief for the appellee are mentioned two Chinese women, Choy Gum (this appellant) and Leong Toe, whose cases are coupled by reason of the claim that they were arrested together, and on page twenty-eight of the brief is mentioned the case of Kwan So, which was pending in the lower Court contemporaneously with the cases of the two persons just mentioned. These three Chinese women, Choy Gum, Leong Toe and Kwan So were all applicants for writs of habeas corpus, and afterwards appellants to the Supreme Court, and one of their main reliances was that they had entered the United States more than three years prior to the respective dates upon which they had been arrested, and hence

having been domiciled within the United States for a period of three years, that they could not be deported under sections twenty and twenty-one of the General Immigration Act of February 20, 1907, as amended and added to by the Act of March 26th, 1910, and also that said Act was unconstitutional. The Court will recall that the amendment of 1910 removed the three year limitation from section three of the said Act, but did not amend sections twenty and twenty-one, which seemed to limit the power of the Secretary to deport within three years after original entry. When the petitions for writs of habeas corpus on behalf of these three persons were presented, the Supreme Court of the United States had not at that time decided the points at issue. These three cases were presented to the lower Court, and deportation was ordered in each of the three cases. They were all appealed to the Supreme Court. The decision of the lower Court in the case of Kwan So is reported in 211 Federal 772. During the pendency of these appeals the detained persons were admitted to bail by permission of the Secretary of Commerce and Labor. After the Supreme Court of the United States in the case of Bugajewitz v. Adams, 228 U. S. 585, and the case of Lapina v. Williams, 232 U. S. 78, had disposed respectively of the question of the three year limitation above mentioned, and the constitutionality of the Act in favor of the government, there was nothing left in the cases of these three

Chinese persons save the question of procedure, in other words, as to whether or not a fair hearing had been accorded. The aliens had been at liberty upon bond by permission of the Secretary of Commerce and Labor obtained some considerable time after the respective Court proceedings upon their behalf had been commenced. During the latter part of December, 1913, the functions formerly exercised by the Secretary of Commerce and Labor being then exercised by the Secretary of Labor, these women were by that official ordered back into custody, and were so surrendered on or about January 5th, 1914, and so remained in custody of the respondent herein until the transpiring of the facts hereinafter mentioned.

Kwan So, her right to perfect her said appeal having lapsed, petitioned again through different counsel on March 3rd, 1914 (15608), for a writ of habeas corpus, which petition was entertained by the lower Court. Upon the subsequent hearing it was shown that the immigration authorities had not only misled counsel for the alien upon the hearing, but it was disclosed for the first time that they had actually submitted much evidence to the Secretary that they had never submitted to the alien, or her counsel, and thus they had no opportunity of meeting it. The lower Court, Judge Dooling, ruled in substance and in effect that there must be some evidence presented against the alien, and that she had the right to be

apprised of all the evidence against her so that she might make answer thereto, and that it was not a fair hearing to withhold evidence from her consideration, and give her no opportunity of answering it and yet submit it to the Secretary and have a warrant of deportation issued thereon. An order of discharge was made and entered April 11th, 1914. The U. S. Attorney was apparently satisfied with the justice of this order for no appeal was taken. In the report of the Commissioner General of Immigration for the year 1914, at the top of page 324, after commenting upon this case, the following appears:

“The Department has decided not to appeal.”

In the cases of Leung Toe and Choy Gum (this appellant), as they were to be presented to the Supreme Court upon appeal, reliance was mainly placed upon the question of the constitutionality of the General Immigration Act and the question of the construction of the statute relative to the three-year limitation, and these matters having subsequently to taking said appeals, been determined adversely in the two Supreme Court decisions mentioned above, that is *Bugajewitz v. Adams*, 228 U. S. 585, *supra*, and the case of *Lapina v. Williams*, 232 U. S. 78, *supra*, there remained no constitutional question open for consideration, but only questions of procedure which properly belonged before the Circuit Court of Appeals, and therefore these appellants did upon their own mo-

tion, on the 16th day of March, 1914, dismiss their appeals before the Supreme Court of the United States. Those two actions and their said motions are reported in 232 U. S. 735. This Honorable Court has held that where points of procedure were involved the appeal is properly taken to the Circuit Court of Appeals, and not to the Supreme Court of the United States.

In re Can Pon et al., 168 Fed. 479:

“GILBERT, Circuit Judge (after stating the facts as above). It is suggested that this Court is without jurisdiction of the appeal, for the reason that the case presents questions of the application of the Constitution of the United States. We find no ground for so holding. If the case as brought to this Court presented constitutional questions only, the appellate Court jurisdiction of the Supreme Court, would, of course, be exclusive. It is doubtful whether the appeal does involve the application of the Constitution. No such question is suggested before this Court. It is true that the petition alleges that certain rules promulgated by the Secretary of the Department of Commerce and Labor are unconstitutional, but those rules have been before the Supreme Court and have been sustained in *United States v. Sing Tuck*, 194 U. S. 161, 24 Sup. Ct. 621, 48 L. ed. 917, and *Chin Yow v. United States*, 208 U. S. 8, 28, Sup. Ct. 201, 52 L. Ed. 369.”

The record in the case of Leung Toe will show that she was deported by the respondent in this action, the Commissioner of Immigration, on April 4th, 1914. The petitioner in this present case, Choy Gum, had been in the custody of the respondent.

ent herein since about January 5th, 1914, and her appeal to the Supreme Court was dismissed on March 16th, 1914, and she therefore on April 16th, 1914, a month after the dismissal of her case before the Supreme Court filed a new application for a writ of habeas corpus, which particularly raised new and further questions dealing with the unfairness of the hearing accorded her, and which cured certain defects in the manner in which certain elements of unfairness were pleaded in the original petition presented upon her behalf. That she was within her rights in presenting this second application, and that the Court properly exercised its discretion in permitting her to do so, and in considering the same, was upheld in the case of Kwan So as hereinbefore stated, and also very weighty authority for the presentation of such an application for a writ of habeas corpus is contained in the case of *Carter v. M'Claughry*, 105 Fed. 614 (before Thayer, Circuit Judge, and Hook, District Judge, the opinion being written by the latter):

“At the threshold of the case counsel for respondent interposes the objection that by reason of the aforementioned proceedings in the courts, and the orders and judgments rendered by them respectively, the matters sought to be presented by petitioner are *res adjudicata*, and that this court is precluded from re-examining them. It is true, the merits of Carter's case as presented were considered by the Circuit Court for the Southern District of New York, and by the Circuit Court of Appeals for the Second Circuit, but, while the judgments of those courts are recognized as of highly

persuasive authority, they do not amount to res adjudicata, nor prevent a re-examination of the same questions in a subsequent habeas corpus proceeding. The action of the Supreme Court was confined to a denial of the application for a writ of certiorari, which is not allowed as a matter of right, and to a dismissal of the appellate proceedings without a consideration of the merits of the case. It is, therefore, the duty of this court to give due consideration to the case presented."

At the bottom of page six in the brief for the appellee the district attorney speaks of petitioner's counsel not being content to abide by his dismissal of the case in the Supreme Court, but immediately surrendered the alien, Choy Gum, to the custody of the immigration officials at Angel Island, and filed a new petition for a writ of habeas corpus. It is to be regretted that matters outside of the record should be presented in the brief in such a misleading manner, and in such a form as to be quite at variance with the true condition, but this was probably due to inadvertence on the part of the attorney for the government in not acquainting himself with the facts before making such a statement. The Immigration records will show that this appellant, Choy Gum, was surrendered into custody on or about January 5th, 1914, and that her case was dismissed before the Supreme Court upon her own motion upon March 16th, 1914, and that the companion case of Leung Toe, who was surrendered into custody at the same time, was dismissed at the same time, and Leong Toe was deported by the

Commissioner, the respondent and appellee herein, upon April 4th, 1914. The Attorney-General knew of the dismissal of these two appeals, and if he was dilatory in placing the remittitur in the hands of the local U. S. Attorney, that is not the fault of the appellant, who in fact believed she was about to be deported. The appellant alleged in her petition (record, page 11) that she expected to be deported at a certain time and place by the respondent, and in demurring to the petition the respondent admits the truth of that allegation for the purpose of the demurrer, and also for the purpose of this appeal. It is even conceded upon the part of the government that long before the date of the hearing and decision of this matter by the trial Court, that the remittitur had been executed and approved, so at best the point had then lost its force and effect. The only matter adjudicated in this case in the former proceeding was that the first petition for a writ of habeas corpus did not state facts sufficient to entitle the petitioner to the relief sought. This was only the adjudication of the lower Court, and the petition never claimed the attention of the Supreme Court of the United States. The attorney for the appellee further on page seven of his brief states that the new petition for a writ of habeas corpus, which is the one herein under consideration, was based upon the same record, and set forth the same facts and conditions as the former petition. Obviously the immigration record in the possession of the petitioner was the same, but this does not apply to the petition which was

presented to the Court. The two petitions are not the same, and differ in almost all of their allegations as a reading thereof would show. Two of the allegations contained in the former petition were objectionable, and were not sufficiently pleaded in that they were allegations which were merely conclusions or charges of bad faith, and such as were held to be insufficient in the case of *Law Wah Suey v. Backus*, 225 U. S. 460, and in the present petition these matters are pleaded in such a way as to properly set forth the facts, and avoid the objections sustained by the Supreme Court in the case last mentioned. The two points which were objectionable and so were repleaded and to which this reference is made constitute the first and second allegations of unfairness which are contained on pages 5, 6, 7 and 8 of the record. The three remaining allegations of unfairness, third, fourth and fifth, which are on pages 8, 9 and 10 of the record, were not contained in the petition first filed upon behalf of the appellant. In view of this statement it seems that the attorney for the appellee is unwarranted in making the statement that the two petitions set forth the same facts and contentions, for such is not the case. The third allegation in the petition (record, pages 8 and 9) was especially framed to meet the condition which developed in the case of *Kwan So* hereinbefore mentioned, and which resulted in her discharge. The intimation that because the immigration record was the same in each instance that a different petition based thereon could not be filed is hardly in

accordance with the principles of pleading. It is not incumbent upon the Court to go through the immigration record in an exhaustive manner to search for errors that have not been alleged. The pleadings themselves mark the limitation of the Court's review of the subject matter. To raise a point to claim the attention of the Court, it must be presented by the pleadings. In the case of *U. S. v. Ju Toy*, 198 U. S. 253, not only does the Supreme Court accept this view, but the judges of the Circuit Court of Appeals for this circuit in framing the questions certified to the Supreme Court, which resulted in the handing down of this decision, were careful to state that the petition did not allege matters of unfairness, and the beginning of the decision of the Supreme Court, after reciting the three questions, is as follows:

"We assume in what we have to say, as the questions assume, that no abuse of authority of any kind is alleged."

A recent decision by the Circuit Court of Appeals for the Fourth Circuit in the case of *U. S. v. Sprung*, 187 Federal Reporter 903, illustrates quite forcibly the point which it is desired to be made on behalf of the appellant that it is essential that the petition should allege the different elements of unfairness. The opinion of the majority of the Court upon this point is as follows:

"The law is well settled that, where such hearing has not been given by the executive officials, their action will be reviewed, and if the facts justify, reversed. *Chin Yow v. United*

States, 208 U. S. 8, 28, Sup. Ct. 201, 52 L. Ed. 369. In this case there is no allegation that a fair hearing was not given the petitioner."

As to just what is meant by the majority of the Court as a fair hearing is ably expressed in the dissenting opinion of Circuit Judge Pritchard in which he elaborates upon the views of the majority of the Court which were undoubtedly expressed in the conference of the members of the Court prior to the formulation of the decision in question. The quotation from the dissenting opinion is from page 908 and 909:

"While these allegations are traversed by the return of the inspector in whose custody she was held, the return, among other things, contains the following allegation:

'That even if she had been married to the said Otto Sprung, as stated in said petition, which the undersigned denies, that would not affect her liability to deportation, as, being a prostitute and therefore not a person of good moral character, she would not be entitled to naturalization as a citizen of the United States under the act of Congress on that subject.'

"It should be observed that the foregoing statement clearly indicates that the inspector was of the opinion, notwithstanding the fact that it might be shown that the petitioner was the wife of an American citizen, that such showing on her part would not relieve her from liability to deportation. The inspector in his return goes still further and insists that ' * * * she would not be entitled to naturalization as a citizen of the United States under the Act of Congress on that subject'. It is insisted by a majority of the court that there are only two instances where the court below would have

jurisdiction to grant a writ of habeas corpus: First, where the pleadings raise a question of law, second, where it is alleged that the petitioner can not obtain a fair and impartial trial before the inspector. Considering the last proposition first, does anyone for a moment imagine that the petitioner could have secured a fair and impartial trial before the inspector in view of the statement just quoted? The fact that the inspector in the face of the decisions of various courts, including the opinion of Justice Harlan, is so reckless as to state in his return that notwithstanding the fact she was married as alleged, still, according to his notions of the law, this unfortunate woman is a subject of deportation—this statement within itself is enough to give one an idea as to the kind of treatment the petitioner would obtain if called upon to appear before him. He seems to be of opinion that once a party is arraigned before him (as the petitioner in this instance) it necessarily follows that she should be deported, notwithstanding the fact that she may be able to show that she is an American citizen by virtue of her marriage. While there is no formal allegation in the petition to the effect that the petitioner could not secure a fair and impartial trial before the inspector, yet the statement of the inspector as to the law bearing upon the points in question afford ample reason why the court below should have assumed jurisdiction. While it would be more formal for the allegation to appear in the petition, yet if, from an inspection of the petition together with the return (and they are to be treated as one for the purpose of determining as to whether the court had jurisdiction), it clearly appears that the petitioner cannot secure a fair and impartial trial, then undoubtedly the court below would have jurisdiction.”

The petition in the case at bar contains numerous assignments of unfairness in the hearing accorded by Immigration Inspector Ainsworth, and the fact that he was the arresting officer as disclosed by the record, and more particularly pointed out in the opening brief on behalf of this appellant, should have disqualified him from conducting the hearing in question. A case which illustrates the impropriety of Inspector Ainsworth placing his unverified statements in the record is that of Ex parte Lam Fuk Tak, 317 Federal 468, in which it is held on page 469:

“It would seem unnecessary to pursue this investigation. Petitioner, a merchant in China, comes here and is admitted as a merchant, bring \$1000.00 in gold, two months since; has been in Wilmington about one month. Except for the statement inserted in the record, not under oath, and doubtless without the knowledge of the petitioner, by the inspector, there is not a scintilla of evidence tending to establish the charge that petitioner obtained his certificate of admission by false or fraudulent representation. It is manifestly improper for an inspector, who has a person in his custody charged with the duty of giving him an opportunity to show cause why he should not be deported, to insert in the examination his own unverified statement regarding the very matter in controversy. If he wishes to become a witness against the alien, he should offer himself in the regular way. The petitioner and his counsel should have an opportunity to confront and cross-examine him.”

Another case which corroborates many of the contentions advanced by this petitioner is that of Ex

parte Lam Pui, 217 Federal Reporter 456. There is a great deal in this opinion which is applicable to the present case, and it is the earnest wish of the appellant that the said opinion might be read in its entirety by the learned judges of this Court. One of the paragraphs of the decision on page 462 is as follows:

“While a statute conferring power to summarily hear and determine rights of person or property, and make final orders affecting such rights, will be so construed as to effectuate the purpose of the legislative department of the government, in respect to its administration, those methods of procedure which experience has demonstrated to be necessary for the protection of such rights against oppressive and arbitrary conduct will be enforced. The courts will not weaken the efficiency of the legislation, or the power conferred upon the administrative officer; but they will not sacrifice substantial and essential rights to summary procedure. This principle is especially applicable when human liberty is involved. While the petitioner is not entitled to demand the constitutional guaranties accorded to our citizens of birth and adoption, he is entitled, by virtue of the certificate issued and passed upon by the lawful authorities, under the supreme law of the land—the treaty between this republic and China—to demand that he be accorded a fair hearing, as near as may be in accordance with elementary rules of procedure obtaining in all nations having organized government, securing the liberty of its own citizens and those of other nations within its borders by invitation or permission.

A more recent case, and one which substantiates the contention of the appellant that it is an error

to deprive her of the right of counsel until after it would be of substantial importance to her is exemplified in the case of *Ex parte Hidekuni Iwata*, 219 Federal 610, in which it is held (*italics our own*):

“In the hearings to be held by the departmental officers the ordinary judicial procedure with its consequent limitations, is not necessarily to be followed. ‘Due process of law’ is secured, as to such aliens as may be brought before the immigration officers, if they are given substantial notice of the reasons urged why they should be deported from this country, if they are given a fair and reasonable opportunity to present evidence controverting any evidence adduced by the department and tending to exculpate them, *if they are afforded at some stage of the hearing reasonably early therein, so as to be of some substantial advantage to them, the opportunity to secure and have the advice and assistance of counsel*, and if it appears, upon the whole proceeding, that the department acted in good faith, and that its determination, as finally arrived at, was fair, and not an arbitrary one, or one induced by a manifest disregard of the alien’s rights in the premises.”

The appellant having answered the additional matters presented on behalf of the appellee, now respectfully feels that this Court should find that the warrant of deportation issued in this matter is illegal by virtue of having been issued as a result of a hearing which was manifestly unfair, and which deprived the appellant of a fair opportunity to be

heard and present her defense to the charge made against her.

Dated, San Francisco,

March 24, 1915.

Respectfully submitted,

GEO. A. MCGOWAN,
Attorney for Appellant.

No. 2475

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHOY GUM, sometimes referred to as
Lo King,

Appellant,

vs.

SAMUEL W. BACKUS, as Commissioner
of Immigration at the Port of San
Francisco,

Appellee.

APPELLANT'S PETITION FOR
A REHEARING.

Filed

JUN 9 - 1915

F. D. Monckton,
Clerk.

GEO. A. MCGOWAN,

Bank of Italy Building, San Francisco,

*Attorney for Appellant
and Petitioner.*

Filed this.....day of June, 1915.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.



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APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable William B. Gilbert, Presiding
Judge, and the Associate Judges of the United
States Circuit Court of Appeals for the Ninth
Circuit:*

The appellant herein most respectfully petitions this Honorable Court for a rehearing herein based upon a consideration of the fact that the hearing conducted by the Immigration Service was before an immigration inspector who acted in the joint capacity of informer, arresting officer, inquisitor

and judge. Viewing the fact that the matters contained in the four assignments of what the appellant contends was conduct vitally prejudicial to her interests, were not the actions of an impartial inspector with his mind free from bias and prejudice, but on the exact contrary, the appellant feels that the fact that the inspector was jointly informer, arresting officer, inquisitor and judge, has caused his actions in said hearing to be prejudicial to her to an extent beyond what would have been the case had the inspector's mind not been biased (perhaps unconsciously) by his former activities against her. In other words, is it not fundamental in American jurisprudence that every person is entitled to a fair trial by an impartial tribunal, and is it not essential that the trial inspector be not disqualified by his former activities in the case, and does not the law so contemplate, and for said reason, are not the proceedings herein illegal and void?

In the decision rendered in this matter the Court recites as follows:

(5) "A copy of the proceedings before the immigration officers is appended to the petition, so that what was actually done is made to appear from the record."

It appears from page 15 of the transcript in the examination of Choy Gum by Immigrant Inspector F. H. Ainsworth that he was the *immigrant officer* with the *arresting* party. This is shown by referring to two separate questions which he framed in his examination of Choy Gum, transcript page 15, wherein he asks:

“Q. But that is the woman who keeps the house, the woman we saw there this morning?”

and in his examination of Tom Yook Lan, transcribed page 20, wherein he asks the following question:

“Q. Was that the lady we saw there this morning?”

It was at that time the custom of the local immigration service to have police officers detailed with them to assist in making the raids and arrests, they, the police officers, acting under the general direction of the immigration officers. The questions framed above by Immigrant Inspector-in-charge Ainsworth, shows that he was with the raiding party, and by his official rank, in charge thereof.

The fact that Immigrant Inspector F. H. Ainsworth was the *examining inspector* is shown in the transcript, page 13, in the examination of Choy Gum; transcript, page 16, in the examination of Leong Toe; transcript, page 18, examination of Ton Yook Lan, and transcript, page 22, the examination of Wong Go.

The further fact that Immigration Inspector F. H. Ainsworth was the *officer applying for the warrant of arrest* is shown by the transcript, page 32, where his initials appear to the application for the warrant of arrest which was presented by him for the signature of the Commissioner of Immigration. It also appears on pages 30 and 31 of the transcript and page 33 of the transcript that Inspector F. H. Ainsworth prepared respectively the first and

second telegraphic applications for a warrant of arrest, his initials appearing at the bottom of each telegram, indicating that he prepared the same, and caused it to be presented to the Commissioner of Immigration for his signature.

The further fact that Immigration Inspector Ainsworth was the *officer conducting the hearing* appears from the transcript, pages 35 and 39.

It appears from the above references to the record that Immigration Inspector F. H. Ainsworth was respectively the arresting immigration officer, the immigration officer conducting the preliminary examinations, the immigration officer preparing the application for the warrant of arrest, the immigration officer preparing the two telegraphic applications for the warrant of arrest, and the immigration officer conducting the hearing accorded upon the warrant of arrest.

The different specifications set forth the matters or doings of Immigration Inspector Ainsworth which the appellant contends vitally prejudiced her case and caused her deportation to be ordered. An impartial inspector with his mind free from those prior connections with the case which clouded and stifled the impartial judgment to which she was entitled and substituted in its place a prejudiced pre-judgment, would the appellant feels, have caused a very different presentation of her case to the Secretary of Commerce and Labor, and one that she feels would have resulted in the cancellation of the warrant of arrest.

In commenting upon this system of procedure, Judge Holt in the case of *U. S. v. Williams*, 185 Fed. 598, states:

“The whole proceeding is usually substantially in the control of one of the inspectors, who acts in it as informer, arresting officer, inquisitor and judge. The secretary who issues the order of arrest and the order of deportation is an administrative officer who sits hundreds of miles away, and never sees or hears the person proceeded against or the witnesses.”

It is true that the regulations provide that the Secretary of the Department shall be the officer who officially determines the case, and either directs the issuance of the warrant of deportation or the cancellation of the warrant of arrest, but the vital and imperative matter to the appellant is that she should have the benefit of having her case heard and recommendation made by an impartial immigration inspector, whose mind is free from bias against her. The great power of the examining inspector, and how he may unjustly wrong an alien in the exercise of the discretion committed to him, is apparent when we read the letter of the Commissioner General of Immigration, under date of March 23rd, 1911 (53244/1-A), promulgating an incorporation of this addition to the regulations of the department under which these hearings were held:

“By direction of the assistant secretary, you are instructed to make arrangements whereby all records of hearings under departmental warrants of arrest will be concluded with a summary and definite recommendation from the examining officer, as to whether or not the

alien whose case is covered by such proceedings should not be deported.

The examining officer is in a particularly good position to make such a recommendation, as he has had an opportunity to observe the conduct of the witnesses under examination and to develop an opinion as to whether or not the testimony of any particular witness is entitled to greater or less weight."

These special directions of the Commissioner-General certainly disclose that whether we call the immigration inspectors conducting these hearings, judges, examining inspectors, or by whatever designation, and whether their final views of the case are called judgments, findings and decrees, reports, or recommendations, the substance is the same. The inspector exercises the functions of the trial judge, and from this vantage point it is most respectfully submitted no partisan mind should be permitted to impede or misdirect the fair and impartial consideration of the evidence submitted and weigh its value. It is further felt that any other system would be un-American, unjust and unworthy of our system of government, whose cornerstones are justice, equality and fair dealing. The regulations promulgated by the department certainly do not authorize that such hearings should be conducted before an immigration inspector who has previously acted in the capacity of arresting officer, examining inspector, and officer applying for the warrant of arrest. It may likewise be said that the regulations do not expressly prohibit such a course of procedure, but it is respectfully sub-

mitted that in the actual administration of these laws, it would be proper to select an immigration inspector to conduct the hearing who has had no such prior connection with the case as would prejudice his mind to the point of stifling all fair and impartial consideration of the evidence submitted.

The difficulty of pointing out affirmatively and in a conclusive manner the extent to which the bias or former connection of the examining inspector with the case at issue, has clouded or misdirected his judgment is appreciated. It is quite improbable that one would be enabled to peer into the working of the mind of the examining inspector, and to be able to say positively wherein he had wronged or misjudged the case of an alien. It is the very existence of this difficulty which leads us to the conclusion that all such hearings which are conducted by an immigration inspector who has had these previous prejudicial connections with the case, are unfair, illegal and void. This Honorable Court in the case of *White v. Gregory*, 213 Fed. 768, held that

“it (the Court) will not inquire into the sufficiency of probative facts, or consider the reasons for the conclusions reached by the officers.”

It is true that the Supreme Court in the case of *Low Wah Suey v. Backus*, 225 U. S. 460, held that:

“Considering the summary character of the hearing provided by statute and the rights given to counsel in the rules prescribed, we are not prepared to say that the rules are so arbitrary and so manifestly intended to deprive the

alien of a fair, though summary, hearing as to be beyond the power of the Secretary of Commerce and Labor under the authority of the statute."

The tribunal was there considering the regulations in a general manner, and not in response to any specific allegation or circumstance. It is perfectly true that an immigration inspector who had no prior connection with the case of Choy Gum might have been detailed to conduct the hearing, and conducting it under the regulations his connection in the premises would have been upheld by the quotation from the case of *Lau Wah Suey v. Backus*, *supra*, but it is also respectfully contended that an immigration inspector who has previously acted in the capacity of an arresting officer and examining inspector, and in that capacity recommended the issuance of a warrant of arrest, made the application therefor, and then with his adverse opinions of the alien as evidenced by his affirmative actions, adverse conclusions and reports against her, is scarcely one whose mind is free from prejudice, and one who could impartially consider the case to be presented by the alien.

It is of course obvious that the preliminary actions of the Commissioner of Immigration and the Secretary of Commerce and Labor, are purely administrative. This does not apply to the immigration inspector whose activities for the time being controls or guides the actions of his superior officers.

An inspection of this record will show that it is entirely conceivable that an immigration inspector, unbiased by any prior connection with the case, might have conducted himself very differently in the proceedings had, and probably would have made a recommendation to the Department which would have been more favorable to the alien, or less prejudicial to her than that made by an examining inspector who had had the prior connections with the case, so complained of in this instance. The very impossibility of determining what the mental attitude of an examining inspector who had no previous connection with the case, would have been on one hand, and to what extent the conclusions, recommendations and conduct of the examining inspector in this case was influenced by his prior action with the case, on the other hand, is the condition which forces us to the conclusion that all such immigration hearings should be before an inspector who is known to be unbiased, or at least one who has not had previous connections with the case of such a character as would cause him to register his opinions, conclusions and belief against the alien prior to according the alien a hearing, and thus placing upon the alien the burden of overcoming the prejudice and registered opinions of the examining inspector, which she would not have to so overcome if her hearing were had before an immigration inspector who had had no previous connection with the case. A case which illustrates the point desired to be made in this connection is

that of *U. S. v. Redfern*, 180 Fed. 500, in which it is held (501-502):

“It is urged by the respondent that there are but three immigrant inspectors at this port, and therefore it is necessary that they all serve upon every board of special inquiry, and, there being not less than three, no other United States officer can be designated to serve on such board. I do not agree with this contention. The law should be construed to mean that, in all cases where there are not three immigration officers eligible to serve, then other United States officers may be designated.

“It is fundamental in American jurisprudence that every person is entitled to a fair trial by an impartial tribunal, and a board of special inquiry constituted as in this case is at least open to suspicion. I do not believe the law contemplates that the inspector who makes the preliminary examination shall serve on the board of special inquiry, and I must hold in this case that the board which denied to petitioner the right to land was illegal and without power.”

There are a large number of reported cases in which warrants of deportation issued as a result of hearings conducted prejudicial to the alien have been cancelled, and set aside, and quite generally in these cases it appears that the inspector conducting the hearing had previously been the arresting officer, inquisitor and the one who applied for, and caused the warrant of arrest to be applied for. Among these cases is that of *U. S. v. Williams*, *supra*, in which it was held:

“Who had any interest in dissuading them except Tedesco and Nicolay? Nicolay had originally made the charge, and Tedesco had

preferred it. They both had the ordinary detective's belief in guilt and zeal for conviction. Tedesco appears at every turn in the transaction resisting all attempts of any counsel to see the aliens."

Another case illustrative of the examining inspector acting as prosecutor and judge is that of *Hanges v. Whitfield*, 209 Fed. 675 (681):

"The conclusion is unavoidable, under the testimony in this case, that the hearing before the inspector (who acted as prosecutor and judge upon such hearing) has not the semblance of a fair hearing."

Another case of an immigration inspector acting in such capacities as herein complained of is that of *Ex Parte Lam Fuk Tak*, 217 Fed. 468.

A further case illustrative of the conditions with respect to the immigration inspector conducting a hearing which is complained of in this regard, is that of *Ex Parte Lam Pui*, 217 Fed. 456. The opinion is quite lengthy, and illustrates many points and cites a great many cases, and the portion of the decision to which the attention of the Court is specifically directed is more of a resume or a conclusion from the different instances cited:

"Long, and frequently sad, experience teaches that when officers intrusted with the administration of laws affecting the liberty of men are permitted to set aside and disregard those safeguards which the wisdom of the ages have set up for the protection of liberty, in respect to those of one race or color, one creed or clime, it is but a short, and easily taken, step to do so when the liberty of the citizen is involved. If necessity, or the public safety,

demands that swift, unusual, and summary methods of procedure be permitted, the power should be conferred by the people's representatives in Congress in clear and unmistakable terms, and not by rules of departments conferring such power upon inspectors."

Another case upon the point of prejudice of the examining inspector is pointed out in *U. S. v. Sprung*, 178 Fed. 903. In the dissenting opinion of Circuit Judge Pritchard he discusses the views of the majority of the Court, in which he states as follows (908):

"It is insisted by a majority of the Court that there are only two instances where the Court below would have jurisdiction to grant a writ of habeas corpus: First, where the pleadings raise a question of law; second, where it is alleged that the petitioner cannot obtain a fair and impartial trial before the inspector."

In the case at bar, the final report or finding of the examining inspector, was an impenetrable vehicle, within which could be cloaked his private opinions and conclusions. What they were, to what extent they submitted matters of evidence, or otherwise prejudiced the rights of appellant may never be known. This communication is a sealed book to the alien. To grant this opportunity to an immigration inspector who has acted as arresting officer, inquisitor and judge, it is felt hardly comports with our ideas of American justice.

Upon the point of the failure to afford an opportunity to answer the affidavits of Layne and

Bohle, an inspector, not prejudiced by his former connection with the case, and his affirmative finding and recommendation that the petitioner was an objectionable alien, would scarcely have withheld the affidavits from counsel until the final hearing, and then prevented their being answered by stating, "I do not feel justified in holding it open any more and will send the record as it appears to Washington with the protest made by you being part of it". The final protest of counsel was:

"ATTORNEY MCGOWAN. We desire to protest at this limitation upon the right of counsel and this abridgment on the ability of the defendant to properly present a full and adequate defense."

The limitation upon the right of counsel and the abridgment on the ability of the defendant to properly present a full and adequate defense had reference to the immediate closing of case after the filing of the affidavits in question, and the giving of no chance to answer them. The obligation of affording an opportunity to answer newly presented evidence rests upon the inspector, Rule 22, Subdivision 4:

"If counsel be selected, he shall be permitted to be present during the further conduct of the hearing, to inspect and make a copy of the minutes of the hearing, so far as it has proceeded, and to offer evidence to meet any evidence theretofore or thereafter presented by the government."

The affidavits in question were matters of evidence "thereafter presented" and the examining

inspector himself disposed of an application for a continuance by forestalling it and stated: "I do not feel justified in holding it open any more, and will send the record as it appears to Washington, etc." The final protest of counsel was after the inspector had so closed the case to send it to Washington, and his protest against "the abridgment on the ability of the defendant to properly present a full and adequate defense" had reference to this exact condition.

With these observations this petition for a rehearing is most respectfully submitted to this Honorable Court.

Dated, San Francisco,
June 8, 1915.

GEO. A. MCGOWAN,
*Attorney for Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for a rehearing is in judgment of counsel well founded, and it is not interposed for delay.

GEO. A. MCGOWAN,
*Attorney for Appellant
and Petitioner.*

See briefs in 2476
No. 2477

United States
Circuit Court of Appeals

For the Ninth Circuit.

MERCHANTS & INSURERS' REPORTING
COMPANY, a Corporation, and BANKERS'
FIRE INSURANCE COMPANY, a Corpora-
tion,

Appellants,

vs.

F. A. JONES, Intervenor, and LYSANDER CAS-
SIDY, as Receiver of the BANKERS' FIRE
INSURANCE COMPANY, a Corporation,

Appellees.

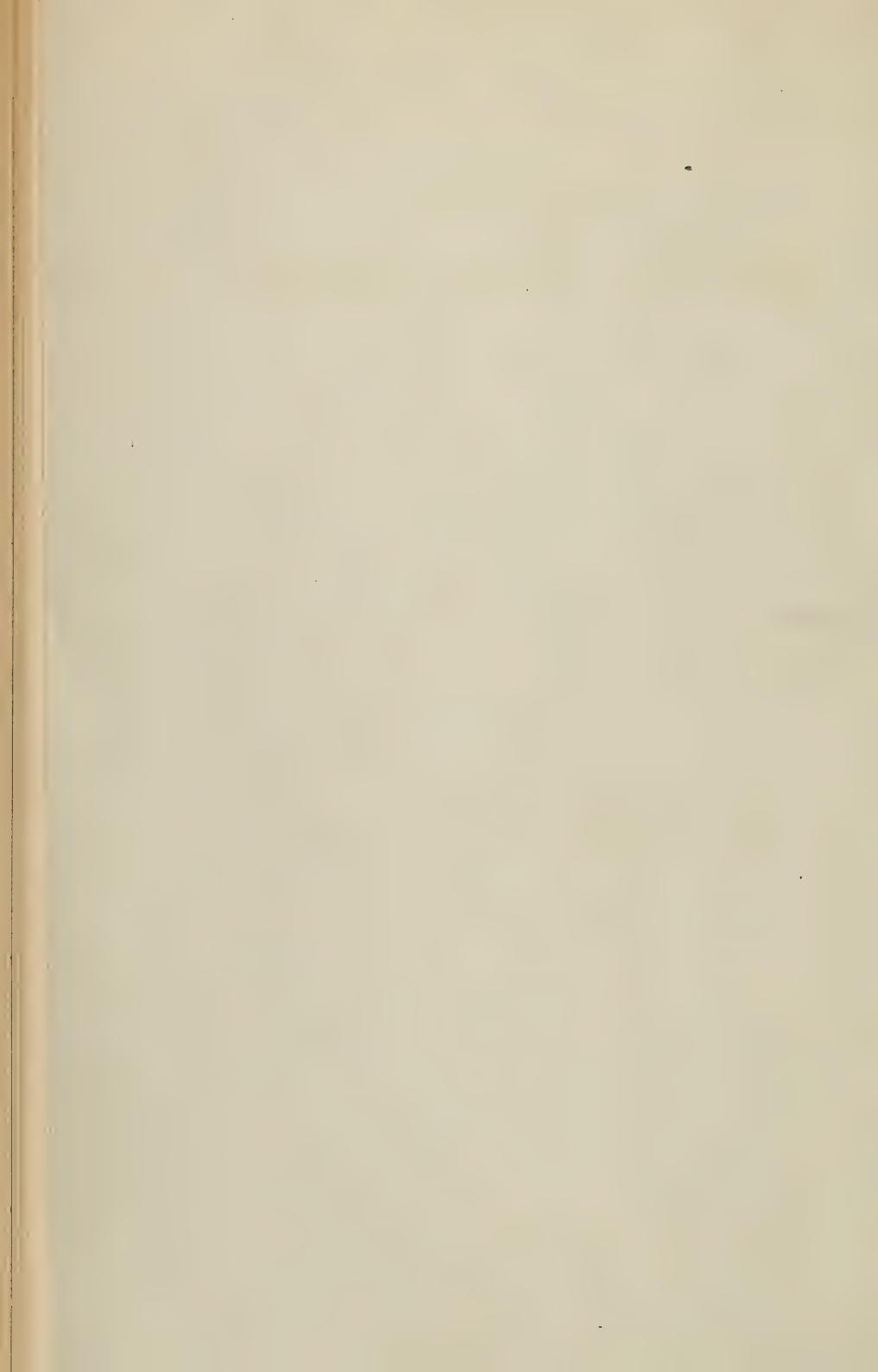
Transcript of Record.

Upon Appeal from the United States District Court
for the District of Arizona.

Filed

SEP 22 1914

F. D. Monckton,
Clerk.



United States
Circuit Court of Appeals

For the Ninth Circuit.

MERCHANTS & INSURERS' REPORTING
COMPANY, a Corporation, and BANKERS'
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Transcript of Record.

Upon Appeal from the United States District Court
for the District of Arizona.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Affidavit of John Castera	73
Affidavit of John Castera, F. W. Boynton, H. Y. Stanley, W. A. Johnston and Marshall Stimson	66
Affidavit of Leroy H. Civile	74
Affidavit of P. A. Parker on Behalf of Inter- venor in Support of His Petition for a Re- ceiver for Defendant Corporation.....	53
Affidavit of Certain Stockholders of the Mer- chants and Insurers' Reporting Company..	33
Amended Petition of F. A. Jones for Leave to Intervene	16
Answer	12
Assignment of Errors.....	82
Certificate of Clerk U. S. District Court to Transcript of Record.....	102
Citation on Appeal (Original).....	104
Complaint	1
Demurrer	38
Joint Answer of Plaintiff and Defendant to Petition in Intervention of F. A. Jones, Verified April 9, 1914.....	69
Minutes of Court—November 12, 1913—Trial..	13

Index.	Page
Minutes of Court—November 25, 1913—Order Dismissing Application for Authority to Consummate Contract for Reinsurance etc..	14
Minutes of Court—December 13, 1913—Order Setting Cause for Hearing.....	15
Minutes of Court—December 20, 1913—Order Granting Leave to F. A. Jones to Intervene etc.	15
Minutes of Court—March 17, 1914—Order Set- ting Cause for Argument on April 7, 1914, etc.	35
Minutes of Court—April 6, 1914—Order Reset- ting Cause for Hearing on April 8, 1914....	36
Minutes of Court—April 8, 1914—Order Grant- ing Leave to File Petition for Intervention, etc.	36
Minutes of Court—April 25, 1914—Order Over- ruling Demurrer etc.	75
Notice of Appeal.....	78
Opposition to Amended Petition of F. A. Jones for Leave to Intervene.....	28
Opposition to Amended Petition of F. A. Jones for Leave to Intervene.....	31
Order Allowing Appeal and Fixing Amount of Supersedeas Bond	91
Order Appointing Receiver	76
Order Under Rule 16, Section 1, Enlarging Time to September 8, 1914, to File Record There- of and to Docket Case	101
Petition for an Order Allowing Appeal.....	80

Index.

Page

Petition of F. A. Jones in Intervention.....	41
Praecipe for Transcript of Record.....	97
Stipulation Enlarging Time to File Record, etc., in Appellate Court to September 8, 1914..	99
Supersedeas Bond	93

[Complaint.]

*In the United States District Court for the District
of Arizona.*

IN EQUITY.

MERCHANTS AND INSURERS' REPORTING
COMPANY,

Complainant,

against

BANKERS' FIRE INSURANCE COMPANY,
Defendant.

To the Honorable WILLIAM H. SAWTELLE,
Judge of the District Court of the United States
for the District of Arizona:

Complainant, Merchants and Insurers' Reporting Company, a corporate citizen of the State of California, duly organized and existing under and by virtue of the laws of said State, and having its office and place for the regular transaction of business in the city of Los Angeles, State of California, brings this its bill against the defendant Bankers' Fire Insurance Company, a corporate citizen of the State of Arizona, having its principal office and place of business in the city of Phoenix, in the State of Arizona.

Your complainant alleges that this suit is one of a civil nature in equity where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and is between citizens of different States, that is to say, between the complainant as a corporate citizen of the State of California, and the defendant as a corporate citizen of the State of California.

And therefore your complainant complains of the defendant and alleges:

I.

At all times hereinafter mentioned complainant was and now is a corporation duly organized and existing under and by virtue of the laws of the State of California, a corporate citizen thereof and resident therein, and an inhabitant thereof, [2*] having its office and place for the regular transaction of business in the city of Los Angeles in the State of California. And your complainant alleges that the defendant above named at all times hereinafter mentioned was and now is a corporation duly organized under and by virtue of the laws of the Territory of Arizona and now existing under and by virtue of the laws of said State, and is a citizen of the State of Arizona, a resident and inhabitant thereof, and having its principal place of business in the city of Phoenix in said State and district aforesaid.

II.

That under and by virtue of the charter of the plaintiff above named, plaintiff was authorized to acquire, hold and own stock in other corporations, and pursuant to such authority your complainant acquired by purchase in or about the month of December, 1909, all of the capital stock of the defendant above named, consisting of two thousand (2,000) shares of the par value of one hundred (\$100.00) dollars each, and that your complainant has ever since remained the owner and holder of all of said capital stock in fact and of record on the books of said de-

*Page-number appearing at foot of page of original certified Record.

fendant, except as to four shares of capital stock in the defendant, which said four shares have from time to time been issued to persons for the purpose of enabling said persons to qualify and act as directors of the defendant company, and that as to these shares your complainant alleges that it is the equitable owner thereof. And your complainant alleges that at the present time Leroy H. Civile is the owner of record of one share of stock in the defendant company and the president and a director thereof, and that at the present time Harry A. Davis is the secretary and treasurer and a director thereof and the holder or owner of record of one share of stock therein, and that C. S. Feldman is the vice-president and a director of the defendant and the holder of one share of the capital stock, of record, in said company. And that the other of said four shares [3] stands of record on the books of said defendant company in the name of John H. Hilgen, a former director and officer of said defendant company, which said share of stock through an inadvertence has not been surrendered to the complainant for cancellation. Your complainant further alleges that the defendant company was by its charter authorized to conduct and engage in the business of a fire insurance company and that pursuant to the authority and power so conferred upon the defendant the defendant heretofore wrote or caused to be written a large number of insurance policies insuring the holders thereof against loss occasioned by fire.

III.

Your complainant further alleges that in and by

chapter forty-nine (49) of the Session Laws of Arizona, 1912, Regular Session, it was, among other things, provided by the terms of section 15 thereof that whenever any corporation theretofore or thereafter organized or incorporated under the laws of the State of Arizona shall revoke or attempt to revoke the appointment of a *bona fide* resident of said State as its agent upon whom all notices or processes may be served without duly appointing another in its place, or whenever at any general or special meeting of the stockholders of any such corporation the holders of a majority of its outstanding stock represented or voting at any such meeting shall have directed the disposal of all corporate assets, or that the corporation be dissolved or that it cease to use or exercise its corporate franchises, or whenever the directors or officers or managing board of any such corporation being thereto authorized or directed by a majority of the outstanding stock thereof representing or voting at any general or special meeting thereof shall have disposed of all corporate assets or dissolved or attempted to dissolve or secure the dissolution of such corporation, or shall have done or attempted to do any of the aforesaid, or when any such corporation shall have disposed of all its property and assets, then and in or on each, every [4] or any one of the foregoing causes, situations, provisions or conditions, either the attorney general of the State or any resident thereof, or any such corporation, or any stockholder or officer of any such corporation may bring, prosecute and maintain, either in the name of the attorney general or in his own name an action in

any court of record of this State to have and procure a judicial dissolution and disincorporation of all rights, privileges and franchises, and wherever it is made to appear to any such court by petition or complaint of any of the aforesaid parties that any one of the above-named causes, provisions, situations or conditions exists in respect to such corporation, such court shall forthwith order or cite such corporation to appear before it and if upon hearing of trial it is made to appear that any one of said causes, conditions, situations or provisions exist, such court shall thereupon dissolve and disincorporate such corporation and forfeit and annul each and every of its rights and privileges and franchises.

IV.

Your complainant alleges on information and belief that on or about the 24th day of October, 1913, the directors of the defendant company, at a meeting by them, regularly called and held, resolved to revoke the appointment of the resident agent in Arizona for the service of process upon the defendant, and in and by said resolution and the acts of said directors the defendant revoked or attempted to revoke the appointment of such agent without duly appointing or appointing at all another in its place. That moreover at a special meeting of the stockholders of the defendant company the holders of more than a majority of its outstanding stock represented and voting at such meeting, to wit, all of the capital stock thereof except one share therein, directed that the said defendant corporation be dissolved and that it cease to use or exercise its corporate franchises, and

that the directors and officers of said defendant company were at said stockholders' meeting by like vote directed [5] to dissolve and to secure the dissolution of such corporation. And your complainant further alleges that, pursuant to the stockholders' resolutions aforesaid and the directions therein contained, thereafter and on the same day, to wit, October 24th, 1913, a directors' meeting of the defendant above named was duly called and held and that it was unanimously resolved by said directors that the said defendant should immediately cease to use and exercise its corporate franchises and that it should immediately dissolve and disincorporate itself pursuant to the provisions of the laws of the State of Arizona, and pursuant to equity and good conscience. And your complainant further alleges in this connection that none of the causes, conditions, situations or provisions hereinbefore set forth, or any of them, have been fraudulently procured for the purpose of defrauding either the creditors of the stockholders of such corporation or any other persons or corporations.

V.

Your complainant further alleges, as separate and further grounds for the dissolution of the defendant company in this Honorable Court, irrespective of the provisions of the statute hereinbefore set forth, that it is and at all times herein mentioned has been the equitable owner of all the assets of the defendant corporation, and further, that until on or about the 21st day of October, 1913, the defendant had issued and outstanding policies of insurance aggregating in

amount approximately — hundred thousand dollars. And upon information and belief your complainant alleges that many of the risks insured by said outstanding policies were dangerous in character and liable to result in great and serious loss both to the defendant company and to your complainant herein if continued in full force and effect, and that for the protection not only of your complainant and of the defendant but of the said outstanding policy-holders in the defendant company on or about the 21st day of October, 1913, the defendant company, with the full knowledge, consent and assistance [6] of your complainant herein, caused all of the risks so outstanding in the name of the defendant and known by the defendant and its officers to be outstanding in its name, to be reinsured and underwritten by an insurance company known as The Fireman's Fund, which said last named corporation is and for a long time prior hereto has been, as your complainant is informed and verily believes, a corporation duly authorized to do and transact the business of fire insurance within the State of Arizona and State of California. And your complainant alleges on information and belief that the said corporation known as The Fireman's Fund is a corporation of great financial strength and one amply able to discharge and pay any and all losses which may arise or occur in connection with the underwriting and reinsurance of the policies heretofore outstanding in the defendant company. And complainant further alleges that the defendant corporation has no debts or other liabilities known to your complain-

ant other than those which appear in the schedule hereto annexed and made a part hereof as though set forth at length, and marked exhibit one. And your complainant further alleges that the major part of the assets and properties of the defendant corporation consist of negotiable instruments almost all of which are made by residents of the State of California, and that your complainant, being the equitable owner thereof, is greatly and seriously embarrassed and hampered in the collection thereof or in making such provision as it deems for its best interest to secure, extend or compromise the payment thereof by reason of the fact that at the present time the defendant company is the legal owner thereof; and as a further reason and ground upon which your complainant seeks and asks the dissolution of the defendant above named your complainant alleges that its rights as the equitable owner of, in and to the negotiable instruments and its other assets now in the possession of the defendant company will be seriously and dangerously jeopardized unless the said defendant be forthwith speedily dissolved, and its assets distributed to those lawfully entitled thereto. [7]

And forasmuch, therefore, as the complainant is without remedy in the premises except in a court of equity where matters of this kind are cognizable, and to the end that the said defendant may be required to answer this complaint, but not under oath, the answer under oath being hereby expressly waived, your complainant prays the Court to grant to it process by subpoena directed to the defendant above named

commanding it to be and appear before this Honorable Court to answer all the allegations of the bill herein at a time and place as therein directed, and your complainant further prays that upon a final hearing of this cause that it be ordered and decreed that the defendant company above named be adjudged to be dissolved and disincorporated and that it cease to use and exercise any and all of its corporate franchises, and that its assets and liabilities be ascertained and determined, and that its assets after the payment of its just debts be distributed to those lawfully entitled thereto, and that for the purpose of dissolution the present directors of the defendant above named, viz., the said Leroy H. Civile, H. A. Davis and C. S. Feldman, and each of them, be constituted trustees of the properties of the defendant above named for the purpose only of the dissolution thereof and the winding up of its said affairs under such bond, if any, as to the Court may seem right and proper; and that if prior to the final hearing in said cause or at any time thereafter the exigencies of the said cause may require it or the rights of the parties hereto be benefited thereby, a receiver of the defendant above named be appointed herein, and that the writ of injunction issue out of this Honorable Court to restrain and prohibit the doing of such acts as may prejudice, defeat or impair the rights of your defendant herein; and for such other and further relief and for general relief in the premises as to this Honorable Court may seem meet and proper, and

your complainant will ever pray.

F. C. STRUCKMEYER,

JOSEPH S. JENCKES,

Solicitors for Complainant. [8]

BANKERS' FIRE INSURANCE COMPANY.

October 1, 1913.

ASSETS.

Bills receivable.....\$191,900.00

(Being notes of various
stockholders of Merchants
& Insurers' Reporting
Co., given in part pay-
ment of subscriptions to
stock in said company and
in most instances secured
by certificates of stock in
said Merchants & Insur-
ers' Reporting Co. as
collateral.)

Furniture and fixtures..... 815.82

Notes secured by mortgage.. 5,250.00

Real estate..... 700.00

Cash on hand and in bank... 6,849.67

Certificate of deposit..... 3,000.00

(Issued to National Surety
Co. for the purpose of
being used as security
on proposed bond to re-
lease attachment. Case
was settled and C. D. not
used for that purpose.)

\$208,515.49 \$208,515.49

LIABILITIES.

Capital stock outstanding.	\$200,000.00	
Reinsurance reserve on policies	unknown	
(since reinsured)		
Total Oct. 1, 1913	\$200,000.00	
Due Sloan, Seabury & Westervelt of Phoenix, for legal services (bill rendered since Oct. 1, 1913)	562.50	
Due E. L. Manning of Phoenix for services (bill rendered since October 1, 1913)	75.00	
Claimed by F. A. Jones of Phoenix for services as President and cash advanced as General Agent to Phoenix Fire Underwriters jointly with this company prorated between the two and not admitted to be due (Claim presented since October 1, 1913)	293.30	
Surplus	7,584.69	
	\$208,515.49	\$208,515.49
Current liabilities incurred during October, 1913, not above included, do not exceed \$1,000.00. [9]		

[Endorsements]: No. E-15. In the United States District Court for the District of Arizona. Merchants and Insurers' Reporting Company, Complainant, against Bankers' Fire Insurance Company, Defendant. Bill of Complaint in Equity. Filed Oct. 25, 1913, at — M. George W. Lewis, Clerk. By E. D. Botts, Deputy. Struckmeyer & Jenckes, Solicitors for Complainant, 414-16 Goodrich Building Phoenix, Arizona. [10]

District Court of the United States, for the District of Arizona.

IN EQUITY.

MERCHANTS & INSURERS' REPORTING
COMPANY,

Complainant,

vs.

BANKERS' FIRE INSURANCE COMPANY,
Defendant.

Answer.

Defendant, answering the complaint of the complainant herein, admits the truth of each and every allegation therein contained.

WHEREFORE, defendant joins in the prayer of the complainant above-named as set forth in said complaint herein, and prays that it may forthwith be dissolved according to law.

SLOAN, SEABURY & WESTERVELT,

Solicitors for Defendant,
Fleming Building, Phoenix, Arizona.

[Endorsements]: E.-15. United States District Court, District of Arizona, Merchants & Insurers' Reporting Company, Complainant, vs. Bankers' Fire Insurance Company, Defendant. Answer. Filed Oct. 25, 1913, at — M. George W. Lewis, Clerk. By E. D. Botts, Deputy. Sloan, Seabury & Westervelt, Fleming Building, Phoenix, Arizona. [11]

[Minutes of Court—November 12, 1913—Trial.]

In the United States District Court for the District of Arizona.

MINUTE ENTRY APPEARING UNDER DATE
OF NOVEMBER 12, 1913.

E.-15.

MERCHANTS & INSURERS' REPORTING
CO.,

Complainant,

vs.

BANKERS' FIRE INSURANCE COMPANY,
Defendant.

Comes now the complainant herein, by its counsel, Struckmeyer & Jenckes, Esquires, and in support of its plea for the dissolution of the defendant corporation, introduces in evidence, H. A. Davis, who was duly sworn and examined, and filed nine exhibits, viz.: Exhibits "A," "B," "C," "D," "F," "G," "H," and "I," and thereupon the complainant rested its case; and the defendant herein, by Sloan, Seabury & Westervelt, Esquires, its counsel, joined in said prayer for dissolution and thereupon the defendant

14 *Merchants & Insurers' Reporting Co. et al.*

rested its case. Whereupon the Court takes the matter under advisement until a future day hereof. [12]

**[Minutes of Court—November 25, 1913—Order
Dismissing Application for Authority to
Consummate Contract for Reinsurance, etc.]**

*In the United States District Court for the District
of Arizona.*

MINUTE ENTRY APPEARING UNDER DATE
OF NOVEMBER 25, 1913.

E.-15.

MERCHANTS & INSURERS' REPORTING
CO.,

Complainant,

vs.

BANKERS' FIRE INSURANCE COMPANY,
Defendant.

The application of the complainant, dated November 21st, 1913, for authority to consummate the contract for reinsurance heretofore made and to distribute amongst the defendant's stockholders all of defendant's assets, saving only such sum as the Court may deem to be sufficient to discharge all outstanding and unpaid debts of defendant, together with all costs and expenses of this suit, including counsel fees, having been argued by counsel and submitted to the Court for its decision, it is ordered that the said application be and the same is hereby dismissed without prejudice. [13]

**[Minutes of Court—December 13, 1913—Order
Setting Cause for Hearing.]**

*In the United States District Court for the District
of Arizona.*

MINUTE ENTRY APPEARING UNDER DATE
OF DECEMBER 13th, 1913.

No. E.-15.

MERCHANTS & INSURERS' REPORTING
CO.,

Complainant,

vs.

BANKERS' FIRE INSURANCE COMPANY,
Defendant.

IT IS ORDERED that this case be set for hearing
on December 20th, 1913, on the petition of F. A.
Jones to intervene. [14]

**[Minutes of Court—December 20, 1913—Order
Granting Leave to F. A. Jones to Intervene,
etc.]**

*In the United States District Court for the District
of Arizona.*

MINUTE ENTRY APPEARING UNDER DATE
OF DECEMBER 20, 1913.

No. E.-15.

MERCHANTS & INSURERS' REPORTING
COMPANY,

Complainant,

vs.

BANKERS' FIRE INSURANCE COMPANY,
Defendant.

IT IS ORDERED that leave be given to counsel for the petitioner to intervene herein to file the amended petition of F. A. Jones, praying for leave to intervene in this cause. [15]

*In the United States District Court for the District
of Arizona.*

MERCHANTS & INSURERS' REPORTING
COMPANY,

Complainant,

vs.

BANKERS' FIRE INSURANCE COMPANY,
Defendant.

**Amended Petition of F. A. Jones for Leave to
Intervene.**

Comes now F. A. Jones for himself and all other stockholders similarly situated, by Mr. George J. Stoneman and Mr. Reese M. Ling, attorneys at law, at Phoenix, Arizona, and makes and files this, his amended petition, for leave to intervene in the above-entitled action, and for grounds of said petition states:

I.

That at all times mentioned in the bill of complaint filed herein, he was and now is a stockholder of and in the Merchants & Insurers' Reporting Company, named as complainant in said bill, to the extent of 50 shares of stock, and that at all of said times there were a large number of other stockholders in said company. [16]

II.

That in addition to the shares of stock so by petitioner owned and held in said company, he represents by written authority the following stockholders owning the following number of shares in said company, to wit:

Name.	Address.	Shares.
H. C. Norris,	Los Angeles,	100
R. R. Hutchins,	Los Angeles,	50
E. C. Ebert,	Los Angeles,	25
R. E. Carter,	Los Angeles,	25
W. S. Allen,	Los Angeles,	100
John Otto,	Los Angeles,	5
Chas. Winsel,	Los Angeles,	50
Hugo Schroeder,	Los Angeles,	200

III.

That it appears that on the 25th day of October, 1913, the complainant herein filed its bill of equity in this court against the defendant herein, alleging, among other things, that the complainant was and is a corporation organized and existing under the laws of the State of California, and that the defendant was and is a corporation organized under the laws of the State of Arizona; and that said complainant is the owner of all of the capital stock of the defendant and that said complainant is the owner of all of the assets of the defendant; and that said complainant is the equitable owner of certain negotiable instruments and assets in the name of said defendant and that the said complainant will be seriously jeopardized unless the defendant is forthwith enjoined from carrying on any further business and

the assets of said defendant be rightfully distributed, and that said bill in equity prays that the defendant be dissolved under the directions of this Court, to which bill the defendant has made answer admitting all of the allegations thereof [17] and joined with the complainant in praying that the Court grant the relief sought.

IV.

That since on or about the month of February, 1913 the defendant company has not been engaged in the conduct of any business except the collection of certain outstanding notes, and that large amounts of money have been expended by the officers of said defendant in salaries of the officers and traveling expenses; that ever since said month of February 1913, the officers of said defendant have been drawing large sums of money from the treasury of said company for alleged services and have paid out large sums of money to attorneys as attorneys' fees, and that said officers of said company have expended large sums of money for alleged traveling expenses all of which said allowances and amounts have been expended from the funds of defendant company and to the great loss of the stockholders of said company. That at a stockholders' meeting of said complainant, a majority of the stockholders or over two-thirds of the issued stock of the complainant was represented, and at said time it was agreed by said stockholders and the officers elect that a dissolution of the defendant should immediately take place, and that the officers elected at said time pledged themselves and agreed with the stockholders

that a dissolution of said defendant should be speedily obtained and that the assets of said company should be distributed to those entitled by law to receive the same; that since said time the officers of said defendant company have wasted the assets of said company, and have grossly mismanaged the affairs of said company to a large extent and have wholly failed to take any steps toward a dissolution [18] of said defendant before the institution of this action, and on or about the 15th day of September, 1913, various stockholders of the complainant herein filed a petition with the Arizona Corporation Commission, at the city of Phoenix, setting forth certain facts and praying that said Corporation Commission take such steps and make such order or orders as would prevent the carrying on of any further business of the defendant and would take such other steps as would be beneficial to your petitioners herein, and to the complainant and the defendant; and that the reason for the filing of said petition was to secure the aid and assistance of the Arizona Corporation Commission in taking such steps as would cause the dissolution of the defendant, and the carrying out of the agreement and understanding entered into by and between the officers of the defendant and its stockholders and prevent any further dissipation of the funds of said defendant; which said petition is hereto attached and made a part hereof and prayed to be read in connection with this petition.

V.

That notwithstanding the fact that the officers elected at said stockholders' meeting held in the

month of July, 1913, as aforesaid, agreed to and with the stockholders that immediate steps would be taken by them to secure the dissolution of the defendant herein, and the winding up of its affairs in an orderly and proper manner, no action was taken by said officers until the institution of this action, when for the purpose of carrying out a plan and scheme for further dissipating and expending the resources of the defendant and thus depriving your petitioner and all of the other stockholders of the complainant and the owners of the [19] assets of the defendant the bill in equity herein was filed, and in said bill certain officers of said company, and the ones who have been instrumental and engaged in the dissipation of the funds and assets of the defendant are asked to be by this Honorable Court constituted trustees for the purpose only of a dissolution of said defendant and the winding up of its said affairs.

WHEREFORE, your petitioners pray that inasmuch as it appears from the record in this cause that both complainant and defendant desire that an order of dissolution be made dissolving the defendant and providing for the distribution of its assets to those lawfully entitled thereto, your petitioners desire and pray the Court that they may be permitted to intervene and be joined as defendants in this action and request that they may be permitted to join in the prayer of the petition to the extent that a receiver be appointed by this Honorable Court under the rule thereof, who shall be empowered to speedily and without great expense, directed to properly administer the affairs of the defendant to the end that it

assets shall not be further dissipated, and your petitioner will ever pray.

GEORGE J. STONEMAN,
REESE M. LING,
Solicitors for Petitioners. [20]

To the Corporation Commission, Phoenix, Ariz.

In Re Bankers' Fire Insurance Company.

Gentlemen:

WE, THE UNDERSIGNED, stockholders of the Merchants and Insurers' Reporting Company, respectfully submit this, our petition, and beg that your commission will see fit to grant the relief prayed for.

We beg to submit the following facts:

1. That the stock of the Bankers' Fire Insurance Company is, with the exception of four (4) shares, all owned by the Merchants and Insurers' Reporting Company; that the stock of the Bankers' Fire Insurance Company was purchased by the Merchants and Insurers' Reporting Company by putting up One Hundred Ninety-five Thousand (\$195,000.00) Dollars in notes and Five Thousand (\$5,000, 00) Dollars in cash; the notes having been given by the stockholders of the Merchants and Insurers' Reporting Company for stock in that corporation; that none of said notes have been collected.

2. That since about February, 1913, the Bankers' Fire Insurance Company has been doing no business whatever, except to attempt to collect the above mentioned notes; that large amounts of money have been spent by the officers of that corporation, according to a report of their financial condition to the real

22 *Merchants & Insurers' Reporting Co. et al.*

owner of the company,—the Merchants and Insurers' Reporting Company; that the officers of the Bankers' Fire Insurance Company are: Leroy H. Civile, President, H. A. Davis, Secretary and Treasurer, and C. S. Feldman, Vice-president; that only one share of stock is held by each officer to qualify them to act as a director.

3. That according to the financial condition of the Company [21] on June 30, 1913, the Bankers' Fire Insurance Company, owned the following property.

Mortgages.....	\$ 5,250.00
Real Estate.....	700.00
Furniture and Fixtures....	800.00
Cash, approximately.....	11,500.00
Stockholders' Notes.....	191,900.00

Total.....\$210,150.00

4. That on June 24, 1913, H. A. Davis and Leroy H. Civile drew for alleged services, each, One Hundred Sixty-six and 67/100 (\$166.67) Dollars; that said officers also drew Two Hundred Fifty (\$250.00) Dollars each for alleged services; that on May 21, 1913, said officers paid Sloan, Seabury and Westervelt, Two Hundred Fifty (\$250.00) Dollars; that on June 30, 1913, said officers paid the same persons for alleged attorneys' fees Two Hundred Fifty (\$250.00) Dollars; that on May 21, 1913, said officers claim to have expended Three Hundred Ninety-eight and 23/100 (\$398.35) Dollars for traveling expenses and for hotel bills; that H. A. Davis has put in bills which have been allowed for at least One Hun-

dred Fifty (\$150.00) Dollars for trips from Phoenix, Arizona, to Los Angeles, Cal., and that said Civile and Davis have put in further claims for Four Hundred Twenty-five (\$425.00) Dollars traveling expenses, all of which have been paid; that there is in the hands of the Board of Directors of the Merchants and Insurers' Reporting Company at Los Angeles, Cal., an itemized statement which contains a great many other items of expense which your petitioners cannot enumerate, but which appear on the books of the Bankers' Fire Insurance Company.

5. That the total amount of surplus on June 30, 1913, amounted to Ten Thousand One Hundred Fifty (\$10,150.00) Dollars, and that as against this the company was the insurer of over a million dollars' worth of property; that said company, although not doing any business, has never had said insurance policies rewritten, and that should there be any material fire losses in the near future, not only will the surplus which is being used [22] by the said officers aforesaid, be eaten up, but the Merchants and Insurers' Reporting Company, and eventually the stockholders, your petitioners, be forced to pay large amounts out of their pockets to cover said losses.

6. That owing to the peculiar condition of the by-laws and the law in Arizona relating to corporations, the Merchants and Insurers' Reporting Company have found it impossible to remove the board of directors of the said Bankers' Fire Insurance Company and that while all the stock, with the exception of said four (4) shares is owned by the Mer-

24 *Merchants & Insurers' Reporting Co. et al.*

chants and Insurers' Reporting Company and the said board of directors of the Merchants and Insurers' Reporting Company are under the control of the stockholders of that company and may be removed on a vote of $\frac{2}{3}$ of the stock of said Merchants and Insurers' Reporting Company, yet the said directors of the Bankers' Fire Insurance Company are taking steps and doing acts which are entirely against the wishes of the real owners of that company and unless restrained will cause great and irreparable loss to the undersigned.

7. *That the* annual stockholders' meeting in July, 1913, over $\frac{2}{3}$ of the stock of the Merchants and Insurers' Reporting Company was represented and the stockholders voted to elect officers who would pledge themselves to cause a dissolution of the said Bankers' Fire Insurance Company; that said Leroy H. Civile and H. A. Davis were present and acquiesced in said agreement to dissolve the said Bankers' Fire Insurance Company; that the subsequent action of those officers has convinced the undersigned, that such action was not contemplated, and that it is the intention of said officers to undertake to launch a fire insurance company under the laws of the State of Arizona, with what assets the Bankers' Fire Insurance Company has at present, and to apply to your Honorable Board for a license to transact such business, and we respectfully [23] submit that the attempted collection of the \$191,900.00 in notes held by the company and which were signed by the stockholders of the Merchants and Insurers' Reporting Company, will result in numerous and costly law-

suits, as there is no intention on the part of a great many of the makers of said notes to pay the same unless forced to do so, if that can be done, in courts of law; that the wishes of a majority of the stockholders of the Merchants and Insurers' Reporting Company is that the Bankers' Fire Insurance Company be dissolved at the earliest possible moment and that the constant drawing on the resources of the company be stopped; and your petitioners cite the *following instance to who of the tremendous loss* and trouble which may be occasioned your petitioners, to wit: J. E. Youtz in 1908 executed eleven of the promissory notes, which have been until recently, held by the Bankers' Fire Insurance Company; that as security for said notes, which were issued for stock of the Merchants and Insurers' Reporting Company; that said J. E. Youtz put up as collateral security the certificates of stock issued therefor; that after the annual stockholders' meeting of the Merchants and Insurers' Reporting Company in July, 1913, the officers of the Bankers' Fire Insurance Company were instructed and agreed not to dispose of any of the notes of the stockholders of the Merchants and Insurers' Reporting Company; that notwithstanding this the said officers, Leroy H. Civile and H. A. Davis proceeded to hire attorneys in the city of Los Angeles and assigned all of said notes executed by J. E. Youtz to one Williams, an employee in the offices of the attorneys aforesaid; that said Williams proceeded to sell the certificates of stock of the said J. E. Youtz at a pretended sale, and sold the same for the sum of \$10.50; that the said Williams thereupon pro-

ceeded to bring an action in the Superior Court of the County of Los Angeles, State of California, for the sum of \$11,000.00, alleging that even the \$10.50 had been used up for the expenses of the pretended [24] sale; that unless some action is taken, the said Board of Directors of the Bankers' Fire Insurance Company will undoubtedly proceed with the same action in regard to the notes held by your petitioners; that the above example was repeated in the case of another stockholder, one J. C. Belton; that with the lawsuits now pending and impending your petitioners feel that not only are the board of directors of the Bankers' Fire Insurance Company violating the trust and confidence reposed in them by your petitioners, but that unless your Honorable Board takes some action to restrain and enjoin the Bankers' Fire Insurance Company from transacting any business whatsoever in the future, that the corporation will suffer great and irreparable loss.

WHEREFORE, your petitioners pray that your Honorable Board issue such order as may be deemed meet in the premises, and especially to restrain the board of directors of the Bankers' Fire Insurance Company from carrying on any further business until such time as your Honorable Board may have had full opportunity to investigate the matter of your petitioner's claim, and to hear the fact in connection therewith; that said Bankers' Fire Insurance Company be ordered to protect the outstanding policies of insurance issued, by having them immediately rewritten in some responsible fire insurance company.

Dated, Los Angeles, Cal., September 15, 1913.

J. E. YOUNTZ.

P. A. PARKER.

WM. H. H. GOODWIN.

C. E. HOLGATE.

G. U. WHITNEY.

SWANFELDT TENT & AWNING CO.

ADAM SWANFELDT,

Pres.

MATHEWS CANDY CO.

A. S. MATHEWS.

E. W. WOOLSEY,

HUGO SCHROEDER,

F. A. JONES. [25]

[Endorsements]: In the United States District Court for the District of Arizona. Merchants & Insurers' Reporting Company, Complainant, vs. Bankers' Fire Insurance Co., Defendant. Amended Petition of F. A. Jones for Leave to Intervene. Filed Dec. 20, 1913, at — M. George W. Lewis, Clerk. By Frank E. McCrary, Deputy. Law Offices, Stone-
man & Ling, 405, 406 and 407 Goodrich Block, Phoenix, Arizona. [26]

*In the United States District Court for the District
of Arizona.*

MERCHANTS & INSURERS' REPORTING
COMPANY,

Complainant,

vs.

BANKERS' FIRE INSURANCE COMPANY,
Defendant.

**Opposition to Amended Petition of F. A. Jones for
Leave to Intervene.**

I.

Comes now H. C. Norris, R. R. Hutchins, E. C. Ebert, R. E. Carter, W. S. Allen, John Otto, Chas. Winsel and Hugo Schroeder, and respectfully represent to the Court in the above-entitled cause that they are the parties named by F. A. Jones on his Amended Petition for intervention in the above-entitled action; that they have read the Amended Petition of said F. A. Jones, in which it is set forth that he represents them by written authority, and they deny that said Jones has such written authority, and they hereby revoke any authority ever given to said Jones to represent them in this action, or any other action.

II.

They further represent that said amended petition does not correctly set forth the facts in reference to the status of the Bankers' Fire Insurance Company in that it states that the present Board of Directors of the Merchants & Insurers' Reporting Company, the owners of the capital stock of the Bankers' Fire Insurance Company are not using their efforts to dissolve both of said companies; whereas [27] the true facts are that the said Board of Directors are proceeding with all possible dispatch to dissolve both of said companies; and that they are not wasting or dissipating the funds of either of said companies. That said Board of Directors have secured a rein-

insurance contract, whereby all insurance liabilities of the Bankers' Fire Insurance Company has been underwritten by a substantial company; that said Bankers' Fire Insurance Company has no further liability, and that their assets are in cash, notes and mortgages; and that the business of the Bankers' Fire Insurance Company may be closed and the assets transferred to the owners of the Merchants & Insurers' Reporting Company.

WHEREFORE, your petitioners pray that an order may be made, providing for the dissolution of the Bankers' Fire Insurance Company, and that the amended petition of said F. W. Jones may be dismissed.

F. C. STRUCKMEYER,
JOSEPH S. JENCKES,

Attorneys for Complainant and Petitioners. [28]

State of California,

County of Los Angeles,—ss.

The undersigned, each for himself, and not one for the other, being by me first duly sworn, deposes and says: That they are the parties named by F. A. Jones in his amended petition for intervention in the above-entitled matter; that they have read the foregoing opposition to amended petition of F. A. Jones for leave to intervene, and know the contents thereof; that the same is true of their own knowledge, except as to the matters which are therein stated upon their

information or belief, and as to those matters they believe it to be true.

H. C. NORRIS.

CHAS. WINSEL.

R. R. HUTCHASON.

W. S. ALLEN.

HUGO SCHROEDER.

E. C. EBERT.

R. E. CARTER.

Subscribed and sworn to before me this 24th day of December, 1913.

[Seal]

F. W. FELLOWS,

Notary Public in and for the County of Los Angeles
State of California. [29]

[Endorsements]: No. E.—15. Dept. ——. In the U. S. District Court for the State of Arizona. Merchants & Insurers' Reporting Co., Complainant, vs Bankers' Fire Ins. Co., Deft. Petition in Opposition to Intervention of F. A. Jones. Received copy of the within Petition this 10th day of January, 1914. Stoneman & Ling, Attorneys for Intervenors. Filed Jan. 10, 1914, at ——. M. George W. Lewis, Clerk. By Frank E. McCrary, Deputy. [30]

*In the United States District Court for the District
of Arizona.*

MERCHANTS & INSURERS' REPORTING
COMPANY,

Complainant,

vs.

BANKERS' FIRE INSURANCE COMPANY,
Defendant.

**Opposition to Amended Petition of F. A. Jones for
Leave to Intervene.**

I.

Comes now H. C. Norris, R. R. Hutchins, E. C. Ebert, R. E. Carter, W. S. Allen, John Otto, Chas. Winsel and Hugo Schroeder, and respectfully represent to the Court in the above-entitled cause, that they are the parties named by F. A. Jones in his Amended Petition for intervention in the above-entitled action; that they have read the Amended Petition of said F. A. Jones, in which it is set forth that he represents them by written authority, and they hereby revoke any authority ever given to said Jones to represent them in this action, or any other action.

II.

They further represent that said amended petition does not correctly set forth the facts in reference to the status of the Bankers' Fire Insurance Co., in that it states that the present Board of Directors of the Merchants & Insurers' Reporting Company, the owners of the capital stock of the Bankers' Fire Insurance Co. are not using their best efforts to dissolve both of said companies; whereas the true facts are that the said Board of Directors are proceeding with all possible dispatch to dissolve both of said companies; and that they are not wasting or dissipating the funds of either of said companies. That said Board of Directors have secured a reinsurance contract, whereby all insurance liabilities of the Bankers' Fire Insurance Co. has been underwritten by a substantial [31] company; that said Bank-

ers' Fire Insurance Co. has no further liability, and that their assets are in cash, notes and mortgage, and that the business of the Bankers' Fire Insurance Co. may be closed and the assets transferred to the owners of the Merchants & Insurers' Reporting Company.

WHEREFORE, your petitioners pray that an order may be made, providing for the dissolution of the Bankers' Fire Insurance Company, and that the amended petition of said F. A. Jones may be dismissed.

(Signed) F. C. STRUCKMEYER,

(Signed) JOS. S. JENCKES,

Attys. for Complainant and Petitioners.

State of California,

County of Los Angeles,—ss.

John Otto, being by me first duly sworn, depose and says: That he is one of the parties who make the opposition in the above-entitled action; that he has heard read the foregoing Opposition to Amended Petition of F. A. Jones, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes to be true.

(Signed) JOHN OTTO.

Subscribed and sworn to before me this 3d day of January, 1914.

[Notarial Seal]

(Signed) F. W. FELLOWS,

Notary Public in and for the County of Los Angeles

State of California. [32]

[Endorsements]: No. E.—15. Dept. ——. In the U. S. District Court for the State of Arizona. Merchants & Insurers' Reporting Company, Plaintiff, vs. Bankers' Fire Insurance Co., Defendant. Petition in Opposition to Intervention of F. A. Jones. Received copy of the within Petition this 10th day of January, 1914. Stoneman & Ling, Attorneys for Intervenors. Filed Jan. 10, 1914, at — M. George W. Lewis, Clerk. By Frank E. McCrary, Deputy. [33]

*In the United States District Court for the District
of Arizona.*

MERCHANTS & INSURERS' REPORTING
COMPANY,

Complainant,

vs.

BANKERS' FIRE INSURANCE CO.,

Defendant.

**Affidavit of Certain Stockholders of the Merchants
& Insurers' Reporting Company.**

State of California,

County of Los Angeles,—ss.

H. C. Norris, R. R. Hutchins, E. C. Ebert, R. E. Carter, W. S. Allen, John Otto, Chas. Winsel and Hugo Schroeder, being first duly sworn depose and say:

That they are stockholders in the Merchants & Insurers' Reporting Company, a corporation of the State of California, and that they own the re-

34 *Merchants & Insurers' Reporting Co. et al.*

spective number of shares set opposite their names as follows:

H. C. Norris, One hundred (100) shares.

R. R. Hutchins, Fifty (50) shares.

E. C. Ebert, Twenty-five (25) shares.

R. E. Carter, Twenty-five (25) shares.

W. S. Allen, One hundred (100) shares.

John Otto, Five (5) shares.

Chas. Winsel, Fifty (50) shares.

Hugo Schroeder, Two hundred (200) shares.

That they have revoked, and do hereby revoke any authority given by them to one F. A. Jones to represent them in the United States District Court for the District of Arizona, in the case of the Merchants & Insurers' Reporting [34] Company and said revocation of authority has been duly mailed to said F. A. Jones, at Phoenix, Arizona.

JOHN OTTO.

Subscribed and sworn to by John Otto before me this 3d day of January, A. D. 1914.

[Seal]

F. W. FELLOWS,

Notary Public in and for the County of Los Angeles,
State of California.

My commission expires Jan. 18, 1917. [35]

[Endorsements]: No. E.-15. District Court of the United States, for the District of Arizona. Merchants & Insurers' Reporting Co., Complainant, vs. Bankers' Fire Insurance Co., Defendant. Affidavit. Copy Received Jany. 9, 1914. Stoneman & Ling, Attys. for Intervenors. Filed Jan. 10, 1914, at — M. George W. Lewis, Clerk. By Frank E.

McCrary, Deputy. Struckmeyer & Jenckes, 145 Goodrich Bldg., Phoenix, Arizona, Attys. for Complainant. [36]

[Minutes of Court—March 17, 1914—Order Setting Cause for Argument on April 7, 1914, etc.]

In the United States District Court for the District of Arizona.

MINUTE ENTRY APPEARING UNDER DATE
OF MARCH 17th, 1914.

No. E.—15.

MERCHANTS AND INSURERS' REPORTING
CO.,

Plaintiff,

vs.

BANKERS' FIRE INSURANCE CO.,

Defendant.

IT IS ORDERED that this case be set down for argument on April 7, 1914, at ten o'clock, A. M., and

IT IS ORDERED that the Clerk notify Messrs. Stoneman and Ling, Esquires, and Messrs. Struckmeyer & Jenckes, Esquires, of the date set for argument. [37]

**[Minutes of Court—April 6, 1914—Order Resetting
Cause for Hearing on April 8, 1914.]**

*In the United States District Court for the District
of Arizona.*

MINUTE ENTRY APPEARING UNDER DATE
OF APRIL 6th, 1914.

No. E.—15.

MERCHANTS & INSURERS' REPORTING CO.
Plaintiff,

vs.

BANKERS' FIRE INSURANCE CO.,
Defendant.

IT IS ORDERED that this case be set for hearing
on April 8, 1914, at two o'clock P. M. [38]

**[Minutes of Court—April 8, 1914—Order Granting
Leave to File Petition for Intervention, etc.]**

*In the United States District Court for the District
of Arizona.*

MINUTE ENTRY APPEARING UNDER DATE
OF APRIL 8th, 1914.

No. E.—15.

MERCHANTS & INSURERS' REPORTING CO.
Plaintiff,

vs.

BANKERS' FIRE INSURANCE CO.,
Defendant.

On this day came the plaintiff, by Messrs. Struckmeyer and Jenckes, its attorneys, and the defendant, by Messrs. W. M. Seabury and James Westervelt, its attorneys, and the intervenors, by Reese Ling, Esquire; and the demurrer of the defendant to the petition for intervention was argued by counsel and submitted to the Court for its decision and the said demurrer was overruled by the Court and the petitioners were permitted to file their petition for intervention herein;

AND IT IS ORDERED that the petitioners be permitted to file their petition for intervention herein;

AND IT IS FURTHER ORDERED that the intervenors be permitted to file affidavits within five days of this date in support of their application for a receiver herein and that the plaintiff and defendant herein be given five days thereafter within which to file their affidavits in opposition to the appointment of a receiver herein, and that the intervenors shall then have two days additional time within which to file their reply affidavits herein, to all of which orders of the Court the plaintiff and defendant, by counsel, excepted and asked that their exception be noted upon the records and the same is accordingly done. [39]

*In the United States District Court for the District
of Arizona.*

MERCHANTS & INSURERS' REPORTING
COMPANY,

Complainant,

vs.

BANKERS' FIRE INSURANCE COMPANY,
Defendant.

Demurrer.

Comes now the defendant, Bankers' Fire Insurance Company, and in opposition to the motion and amended petition filed herein on or about December 20, 1913, by F. A. Jones, for himself and in the alleged behalf of other persons therein mentioned, for leave to intervene in the above-entitled cause, the defendant above named:

I.

Demurs to the said proposed petition upon the ground that it fails to state facts sufficient to constitute a cause of equitable cognizance in this court and cause and also upon the ground that it fails to state facts sufficient to constitute cause for intervention herein by the said F. A. Jones or any of the other persons therein named.

II.

And defendant particularly demurs to said petition upon the ground, among others, that a minority stockholder of the plaintiff has no cause of action against anyone for the alleged extravagance and waste of the directors of the defendant company, a

set forth in said amended intervening petition, for the reason that said cause of action, even if the facts stated were true, would be and is vested in the plaintiff company against the individual directors of the defendant. [40]

III.

Upon the further ground that the proposed intervenors are not necessary or proper parties to the above-entitled cause but are unnecessary and improper parties thereto.

IV.

Upon the further ground that the proposed intervenors have wholly failed to make any allegations in compliance with Equity Rule 27.

V.

Upon the further ground that if admitted to the above-entitled cause as intervenors therein, the only function which the said proposed intervenors seek to perform, is to move for the appointment of a receiver of the defendant company.

And should the foregoing demurrers and each of them be overruled, without waiving defendant's exceptions thereto, and reserving each and all of the foregoing objections and exceptions to the matters aforesaid, defendant denies that the said proposed intervenor, F. A. Jones, is authorized to represent any of the persons named in the said proposed amended petition in intervention filed herein on or about December 20, 1913, and in this connection defendant alleges that each of the persons named in said proposed amended petition in intervention, except the said F. A. Jones, has revoked any authority

previously existing in the said Jones to represent them or any of them, and that the said F. A. Jones is not now, as defendant is informed and believes, authorized to represent any of the persons named in said proposed amended intervening petition.

On information and belief, defendant alleges that the application of the said F. A. Jones for leave to intervene herein is not made in good faith, but in reality is simply an [41] effort upon the part of the said F. A. Jones to prevent the expeditious and economical dissolution of the defendant company by applying for the appointment of a receiver of said company and in support of said allegation the defendant asks leave to call one or more witnesses upon the hearing of the application of the said F. A. Jones for leave to intervene herein in opposition to said application.

WHEREFORE, defendant respectfully prays that the application of the said F. A. Jones and the other persons named in the proposed intervening amended petition filed herein on or about December 20, 1913, be denied.

RICHARD E. SLOAN,
W. M. SEABURY,
JAMES WESTERVELT,
Solicitors for Defendant.

[Endorsements]: In the United States District Court for the District of Arizona. *Merchants & Insurers' Reporting Company vs. Bankers' Fire Insurance Co.* Demurrer. Filed April 8, 1914. George W. Lewis, Clerk. Sloan & Westervelt, Fleming Building, Phoenix, Arizona. [42]

*In the United States District Court for the District
of Arizona.*

MERCHANTS & INSURERS' REPORTING
COMPANY,

Complainant,

vs.

BANKERS' FIRE INSURANCE COMPANY,
Defendant.

Petition of F. A. Jones in Intervention.

Leave of the Court having on the 8th day of April, 1914, been duly granted, comes now F. A. Jones for himself and all other stockholders similarly situated, by Mr. George J. Stoneman and Mr. Reese M. Ling, attorneys at law, at Phoenix, Arizona, makes and files this petition in intervention in the above-entitled action, and for grounds of said petition states:

I.

That all times mentioned in the bill of complaint filed herein he was and now is a stockholder of and in the Merchants & Insurers' Reporting Company, named as complainant in said bill, to the extent of 50 shares of stock, and that at all of said times there were a large number of other stockholders in said Company.

II.

That in addition to the shares of stock so by petitioner owned and held in said Company, he represents by written authority the following stockholders owning the following number of shares in said Company, to wit: [43]

42 *Merchants & Insurers' Reporting Co. et al.*

Name.	Address.	Share.
C. C. Thompson,	Pasadena, Calif.,	2
W. C. Humphreys,	Pasadena, Calif.,	1
August and Christian Stahlke,	Pasadena, Calif.,	2
E. C. Harris,	Pasadena, Calif.,	
May D. Bassett,	Pasadena, Calif.,	1
Chas. E. Holgate,	Los Angeles, Calif.,	
Dr. W. E. Hutchison,	Los Angeles, Calif.,	2
Dana Burks,	Los Angeles, Calif.,	2
L. Lindsay,	Los Angeles, Calif.,	
L. A. Phillips,	Los Angeles, Calif.,	
Frank G. Story,	Los Angeles, Calif.,	2
Mary Gantzer,	Pasadena, Calif.,	
Frank A. Zimmerman,	Los Angeles, Calif.,	
Chas. M. Parker,	Pasadena, Calif.,	
C. W. Harper,	Los Angeles, Calif.,	

III.

That it appears that on the 25th day of October 1913, the complainant herein filed its bill of equity in this Court against the defendant herein, alleging among other things, that the complainant was and is a corporation organized and existing under the laws of the State of California, and that the defendant was and is a corporation organized under the laws of the State of Arizona; and that said complainant is the owner of all of the capital stock of the defendant and that said complainant is the owner of all of the assets of the defendant; and that said complainant is the equitable owner of certain negotiable instruments and assets in the name of said defendant and that the said complainant will be serious

jeopardized unless the defendant is forthwith enjoined from carrying on any further business, and the assets of said defendant be rightfully distributed; and that said bill in equity prays that the defendant be dissolved under the directions of this Court, to which bill the defendant has made answer, admitting all of the allegations thereof and joined with the complainant in praying that the Court grant the relief sought. [44]

IV.

That since on or about the month of February, 1913, the defendant company has not been engaged in the conduct of any business except the collection of certain outstanding notes and that large amounts of money have been expended by the officers of said defendant in salaries of the officers and traveling expenses; that ever since said month of February, 1913, the officers of said defendant have been drawing large sums of money from the treasury of said company for alleged services and have paid out large sums of money to attorneys as attorneys' fees, and that said officers of said company have expended large sums of money for alleged traveling expenses; all of which said allowances and amounts have been expended from the funds of defendant company and to the great loss of the stockholders of said company. That at a stockholders' meeting of said complainant, a majority of the stockholders or over two-thirds of the issued stock of the complainant was represented and at said time it was agreed by said stockholders and the officers-elect that a dissolution of the defendant should immediately take place, and that the

officers elected at said time pledged themselves and agreed with the stockholders that a dissolution of said defendant should be speedily obtained and that the assets of said company should be distributed to those entitled by law to receive the same; that since said time the officers of said defendant company have wasted the assets of said company, and have grossly mismanaged the affairs of said company to a large extent and have wholly failed to take any steps toward a dissolution of said defendant before the institution of this action, and on or about the 15th day of September, 1913, various stockholders of the complainant herein filed a petition with the Arizona Corporation Commission, at the city [45] of Phoenix, setting forth certain facts and praying that said Corporation Commission take such steps and make such order or orders as would prevent the carrying on of any further business of the defendant and would take such other steps as would be beneficial to your petitioners herein, and to the complainant and the defendant; and that the reason for the filing of said petition was to secure the aid and assistance of the Arizona Corporation Commission in taking such steps as would cause the dissolution of the defendant, and the carrying out of the agreement and understanding entered into by and between the officers of the defendant and its stockholders and prevent any further dissipation of the funds of said defendant; which said petition is hereto attached and made a part hereof and prayed to be read in connection with this petition.

V.

That notwithstanding the fact that the officers elected at said stockholders' meeting held in the month of July, 1913, as aforesaid, agreed to and with the stockholders that immediate steps would be taken by them to secure the dissolution of the defendant herein, and the winding up of its affairs in an orderly and proper manner, no action was taken by said officers until the institution of this action, when for the purpose of carrying out a plan and scheme for further dissipating and expending the resources of the defendant and thus depriving your petitioners and all of the other stockholders of the complainant and the owners of the assets of the defendant, the bill in equity herein was filed, and in said bill certain officers of said company, and the ones who have been instrumental and engaged in the dissipation of the funds and assets of the defendant are asked to be by this Honorable Court constituted trustees for the purpose only of a dissolution of said defendant and the winding up of its said affairs. [46]

WHEREFORE, your petitioners pray that inasmuch as it appears from the record in this cause that both complainant and defendant desire that an order of dissolution be made dissolving the defendant and providing for the distribution of its assets to those lawfully entitled thereto; that they may be joined as defendants in this action; that a receiver be appointed by this Honorable Court under the rules thereof, who shall be empowered to speedily and without great expense, directed to prop-

erly administer the affairs of the defendant to the end that its assets shall not be further dissipated, and the same be distributed to those lawfully entitled thereto, and your petitioner will ever pray.

GEORGE J. STONEMAN,

REESE M. LING,

Solicitors for Petitioners. [47]

United States of America,

State of Arizona,

County of Maricopa.

F. A. Jones, being by me first duly *sown*, upon his oath deposes and says: That he has read the foregoing petition in intervention and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters stated therein upon information and belief, and as to those matters he believes it to be true.

F. A. JONES.

Subscribed and sworn to before me this 9th day of April, 1914.

[Notarial Seal]

M. C. WEAVER,

Notary Public. [48]

To the Corporation Commission, Phoenix, Ariz.:

In Re Bankers' Fire Insurance Company.

Gentlemen:—

WE, THE UNDERSIGNED, stockholders of the Merchants and Insurers' Reporting Company, respectfully submit this, our petition, and beg that your commission will see fit to grant the relief prayed for.

We beg to submit the following facts:

1. That the stock of the Bankers' Fire Insur-

ance Company is, with the exception of four (4) shares, all owned by the Merchants and Insurers' Reporting Company; that the stock of the Bankers' Fire Insurance Company was purchased by the Merchants and Insurers' Reporting Company by putting up One Hundred Ninety-five Thousand (\$195,000.00) Dollars in notes and Five Thousand (\$5,000.00) Dollars in cash; the notes having been given by the stockholders of the Merchants and Insurers' Reporting Company for stock in that corporation; that none of said notes have been collected.

2. That since about February, 1913, the Bankers' Fire Insurance Company has been doing no business whatever, except to attempt to collect the above-mentioned notes; that large amounts of money have been spent by the officers of that corporation, according to a report of their financial condition to the real owner of the company,—the Merchants and Insurers' Reporting Company; that the officers of the Bankers' Fire Insurance Company are: Leroy H. Civile, President, H. A. Davis, Secretary and Treasurer, and C. S. Feldman, Vice-president; that only one share of stock is held by each officer to qualify them to act as a director.

3. That according to the financial condition of the company [49] on June 30, 1913, the Bankers' Fire Insurance Company owned the following property:

48 *Merchants & Insurers' Reporting Co. et al.*

Mortgages.....	\$ 5,250.00
Real Estate.....	700.00
Furniture and Fixtures.....	800.00
Cash, approximately.....	11,500.00
Stockholders' Notes.....	191,900.00

Total.....\$210,150.00

4. That on June 24, 1913, H. A. Davis and Leroy H. Civile drew for alleged services, each, One Hundred Sixty-six and 67/100 (\$166.67) Dollars; that said officers also drew Two Hundred Fifty (\$250.00) Dollars each for alleged services; that on May 21, 1913, said officers paid Sloan, Seabury and Westervelt, Two Hundred Fifty (\$250.00) Dollars; that on June 30, 1913, said officers paid the same persons for alleged attorneys' fees Two Hundred Fifty (\$250.00) Dollars; that on May 21, 1913, said officers claimed to have expended Three Hundred Ninety-eight and 23/100 (\$398.35) Dollars for traveling expenses and for hotel bills; that H. A. Davis has put in bills which have been allowed for at least One Hundred Fifty (\$150.00) Dollars for trips from Phoenix, Arizona, to Los Angeles, Cal., and that said Civile and Davis have put in further claims for Four Hundred Twenty-five (\$425.00) Dollars traveling expenses, all of which have been paid; that there is in the hands of the Board of Directors of the Merchants and Insurers' Reporting Company at Los Angeles, Cal., an itemized statement which contains a great many other items of expense which your petitioners cannot enumerate, but which appear on the books of the Bankers' Fire Insurance Company.

5. That the total amount of surplus on June 30, 1913, amounted to Ten Thousand One Hundred Fifty (\$10,150.00) Dollars, and that as against this the company was the insurer of over a million dollars worth of property; that said company, although not doing any business, has never had said insurance policies rewritten, and that should there be any material fire losses in the near future, not only will the surplus which is being used [50] by the said officers aforesaid, be eaten up, but the Merchants and Insurers' Reporting Company, and eventually the stockholders, your petitioners, be forced to pay large amounts out of their pockets to cover said losses.

6. That owing to the peculiar condition of the by-laws and the law in Arizona relating to corporations, the Merchants and Insurers' Reporting Company have found it impossible to remove the board of directors of the said Bankers' Fire Insurance Company, and that while all the stock, with the exception of said four (4) shares is owned by the Merchants and Insurers' Reporting Company, and the said Board of Directors of the Merchants and Insurers' Reporting Company are under the control of the stockholders of that company and may be removed on a vote of $\frac{2}{3}$ of the stock of said Merchants and Insurers' Reporting Company, yet the said directors of the Bankers' Fire Insurance Company are taking steps and doing acts which are entirely against the wishes of the real owners of that company, and unless restrained will cause great and irreparable loss to the undersigned.

7. *That the* annual stockholders' meeting in July, 1913, over $\frac{2}{3}$ of the stock of the Merchants and

Insurers' Reporting Company was represented and the stockholders voted to elect officers who would pledge themselves to cause a dissolution of the said Bankers' Fire Insurance Company; that said Leroy H. Civile and H. A. Davis were present and acquiesced in said agreement to dissolve the said Bankers' Fire Insurance Company; that the subsequent action of those officers has convinced the undersigned that such action was not contemplated, and that it is the intention of said officers to undertake to launch a fire insurance company under the laws of the State of Arizona, with what assets the Bankers' Fire Insurance Company has at present, and to apply to your Honorable Board for a license to transact such business, and we respectfully [51] submit that the attempted collection of the \$191,900.00 in notes held by the company and which were signed by the stockholders of the Merchants and Insurers' Reporting Company, will result in numerous and costly lawsuits, as there is no intention on the part of a great many of the makers of said notes to pay the same unless forced to do so, if that can be done, in courts of law; that the wishes of a majority of the stockholders of the Merchants and Insurers' Reporting Company is that the Bankers' Fire Insurance Company be dissolved at the earliest possible moment, and that the constant drawing on the resources of the company be stopped; and your petitioners cite the following instance to show of the tremendous loss and trouble which may be occasioned your petitioners, to wit: J. E. Youtz in 1908 executed eleven of the promissory notes, which have

been until recently, held by the Bankers' Fire Insurance Company; that as security for said notes, which were issued for stock of the Merchants and Insurers' Reporting Company; that said J. E. Youtz put up as collateral security the certificates of stock issued therefor; that after the annual stockholders' meeting of the Merchants and Insurers' Reporting Company in July, 1913, the officers of the Bankers' Fire Insurance Company were instructed and agreed not to dispose of any of the notes of the stockholders of the Merchants and Insurers' Reporting Company; that notwithstanding this the said officers Leroy H. Civile and H. A. Davis proceeded to hire attorneys in the City of Los Angeles and assigned all of said notes executed by J. E. Youtz to one Williams, an employee in the offices of the attorneys aforesaid; that said Williams proceeded to sell the certificates of stock of the said J. E. Youtz at a pretended sale, and sold the same for the sum of \$10.50; that the said Williams thereupon proceeded to bring an action in the Superior Court of the County of Los Angeles, State of California, for the sum of \$11,000.00, alleging that even the [52] \$10.50 had been used up for the expenses of the pretended sale; that unless some action is taken, the said Board of Directors of the Bankers' Fire Insurance Company will undoubtedly proceed with the same action in regards to the notes held by your petitioners; that the above example was repeated in the case of another stockholder, one J. C. Belton; that with the lawsuits now pending and impending your petitioners feel that not only are the board of directors of the Bankers' Fire

Insurance Company violating the trust and confidence reposed in them by your petitioners, but that unless your Honorable Board takes some action to restrain and enjoin the Bankers' Fire Insurance Company from *transaction* any business whatsoever in the future, that the corporation will suffer great and irreparable loss.

WHEREFORE, your petitioners pray that your Honorable Board issue such order as may be deemed meet in the premises, and especially to restrain the board of directors of the Bankers' Fire Insurance Company from carrying on any further business until such time as your Honorable Board may have had full opportunity to investigate the matter of your petitioners' claim, and to hear the fact in connection therewith; that said Bankers' Fire Insurance Company be ordered to protect the outstanding policies of insurance issued, by having them immediately re-written in some responsible fire insurance company.

Dated Los Angeles, Cal., September 15, 1913.

J. E. YOUTZ.

P. A. PARKER.

WM. H. H. GOODWIN.

C. E. HOLGATE.

G. U. WHITNEY.

SWANFELDT TENT & AWNING CO.,

ADAM SWANFELDT,

Pres.

MATHEWS CANDY CO.,

A. S. MATHEWS.

E. W. WOOLSEY.

HUGO SCHROEDER,

F. A. JONES. [53]

*In the United States District Court for the District
of Arizona.*

MERCHANTS & INSURERS' REPORTING
COMPANY,

Complainant,

vs.

BANKERS' FIRE INSURANCE COMPANY,
Defendant.

F. A. JONES,

Intervenor.

State of California,
County of Los Angeles,—ss.

**Affidavit [of P. A. Parker] on Behalf of Intervenor
in Support of His Petition for a Receiver for
Defendant Corporation.**

P. A. Parker, being duly sworn, says that the complainant corporation was incorporated in the fore part of the year 1906, under the laws of the State of California, with a capital stock of \$500,000.00, divided into 50,000 shares of a part value of \$10.00 each. That at or about the time of its incorporation, of said stock there was sold an amount thereof, for cash, to various and divers persons and individuals, in excess of \$100,000.00, that there was also a large amount of said stock sold to various and divers persons and individuals for which they did not pay cash, but gave their promissory five year notes therefor, which would mature, and which did mature, on the first day of July, 1913; said promissory notes totaled to the amount of approximately \$250,000.00, and in

each individual case where the stock was issued to the purchaser thereof, the same was not delivered to him, but was attached to said promissory note as collateral security therefor.

That thereafter, on the third day of December, 1909, the [54] defendant, to wit, Bankers' Fire Insurance Company, was incorporated under the laws of the then Territory of Arizona, with a capital stock of \$200,000.00, divided into 2,000 shares of a par value of \$100.00 each; that almost immediately thereafter, the said complainant became the owner of all of the stock of the said defendant corporation, to wit, said 2,000 shares of stock, with the exception of three shares thereof which were held by other persons to complete the Board of Directors of said defendant corporation. That in payment therefor the said complainant paid the sum of \$5,000.00 in cash, and turned over to said defendant corporation of said promissory notes \$195,000.00 thereof, which said notes thereupon became an asset of the defendant corporation.

That the said defendant corporation, prior to the month of February, 1913, did a large insurance business and issued policies of insurance to the stockholders of the complainant corporation, and to others in excess of the sum of \$600,000.00.

That the only object and purpose of incorporation of complainant was to become a Holding Company of Insurance Companies, and that the purpose of the incorporation of the defendant, was to engage in the fire insurance business.

That about two years prior to the first day of July,

1913, one Robert Mitchell, an attorney at law of the city of Los Angeles, California, began an attack against the integrity and honor of both the complainant corporation, and the defendant corporation, and persistently, during said period of two years, kept up said attack; that he wrote scurrilous articles concerning both of said corporations in which he repeatedly referred to said corporations as fake corporations, and fraudulent corporations, and that said Mitchell, in connection with other persons, succeeded in sowing such discord among the stockholders of complainant corporation that at the annual meeting of the stockholders of complainant corporation held in the city of Los Angeles, California, in the month of July, [55] 1913, a new Board of Directors were elected, who were at said meeting pledged to take immediate steps to bring about the dissolution of the defendant corporation, as well as the Phoenix Fire Underwriters, another Insurance Company incorporated under the laws of Arizona on the said third day of December, 1909, with a capital of \$100,000.00, and of which said last corporation, the complainant herein soon after its incorporation, became the owner of all the stock thereof, with the exception of three shares which were held by other persons to fill the Board of Directors thereof; that notwithstanding the pledge upon which said new Board of Directors was elected, no steps whatsoever were taken to bring about the dissolution of the said two corporations other than in the manner as appears of record herein; that no steps have ever been taken by the officers of the said Bankers' Fire Insurance Company, nor the

Phoenix Fire Underwriters, at the instigation or solicitation of complainant to liquidate the affairs of the said two corporations by collecting in its assets, or otherwise; that no attempt has been made by the officers of the defendant corporation to enforce payment of any of the promissory notes given as hereinabove stated, and turned over to the defendant corporation in payment for its stock as hereinbefore stated, notwithstanding the fact that *that* said notes matured on the first day of July, 1913. That four of the Board of Directors of the complainant corporation, to wit, John Casteria, who is president of said corporation, Marshall Stimson, H. Y. Stanley and F. W. Boynton, all stockholders of said corporation, gave their promissory notes for their stock, and have never paid any cash therefor, nor have they ever paid their said promissory notes, or any part thereof.

That on the twenty-first day of October, 1913, the President of complainant corporation, to wit, John Casteria, and the President of the Bankers' Fire Insurance Company, to wit, Leroy H. Civile, and the said Phoenix Fire Underwriters, by its President, Leroy H. Civile, [56] made and entered into a contract with the Fireman's Fund Insurance Company whereby all of the insurance business held by the said two Arizona corporations, to wit, Bankers' Fire Insurance Company and the Phoenix Fire Underwriters, was rewritten with and taken over by the said Fireman's Fund Insurance Company at a great expense and loss to the said Arizona corporations, a copy of which said agreement is attached hereto, marked Exhibit "A," and made a part of this

affidavit. That said agreement was entered into notwithstanding the fact that the Arizona Corporation Commission had made its order relating to the affairs of the defendant Bankers' Fire Insurance Company, a copy of which said order is attached hereto, marked Exhibit "B," and made a part of this affidavit, and that a similar order, at the same time, was made by said corporation commission concerning the affairs of the Phoenix Fire Underwriters. That the said Phoenix Fire Underwriters and the said defendant, the Bankers' Fire Insurance Company, are not now and have not been, since the month of February, 1913, engaged in any business whatsoever; that they have no income from any source, and that notwithstanding large amounts of money have been expended by the officers of said defendant corporation, as well as the Phoenix Fire Underwriters, in salaries of the officers, and traveling expenses; that ever since the said month of February, 1913, the officers of said defendant corporation, have been drawing large sums of money from the treasury of said company for alleged services and have paid out large sums of money to attorneys for attorneys' fees, and that said officers of said company have expended large sums of money for alleged traveling expenses, all of which said allowance and amounts have been expended from the funds of defendant company, and the Phoenix Fire Underwriters, to the great loss of the stockholders of complainant corporation; that stockholders of complainant corporation, although demand therefor has been made, have been refused access to the books of the defendant corporation, as well as [57] the

Phoenix Fire Underwriters, notwithstanding the fact that the complainant corporation is the owner of all of the stock of said two insurance corporations; that affiant is informed, and upon such information believes, that all of the directors of both the defendant corporation and the said Phoenix Fire Underwriters, each of which is composed of three directors, have resigned, with the exception of Leroy H. Civile, and that the said Leroy H. Civile is the sole and remaining director, or other officer, of either of said two insurance companies; that the said Leroy H. Civile is absolutely under the dominion and control and direction of the Board of Directors of complainant corporation; that since the election of the Board of Directors at the annual stockholders' meeting in July, 1913, at which a Board of Directors was elected as hereinbefore stated, the law firm of Mitchell and Slosson, the hereinbefore said Robert Mitchell being a member of said firm together with said Marshall Stimson, have been the attorneys for the complainant corporation, the defendant corporation and the said Phoenix Fire Underwriters, and that the said Mitchell, notwithstanding his attack upon the said corporation as hereinbefore stated, is now directing as legal adviser, the affairs of said corporations.

That the defendant Bankers' Fire Insurance Company and the complainant corporation, by its officers and its said attorneys, are now engaged in maintaining costly and unnecessary suits in the courts of California and that the assets of said corporation are being consumed in such litigation; that notwithstanding the fact that the defendant Bankers' Fire Insurance

Company and the Phoenix Fire Underwriters were incorporated under the laws of Arizona, with the principal place of business of both of said corporations at Phoenix, Arizona, neither of said corporations maintain an office in Arizona; that the said Leroy H. Civile, President of both of said Arizona corporations, is a citizen of Los Angeles, [58] California, and in conjunction with John Casteria, President of complainant corporation, is conducting and carrying on a general insurance and real estate business in the said city of Los Angeles, and affiant further says that the assets of both of said Arizona corporations, as well as all of the books and papers of both of said corporations, are in the city of Los Angeles, and without the State of Arizona.

Affiant modifies this affidavit to the following extent: That one suit at law was instituted shortly after the election of the new Board of Directors in July, 1913, upon a promissory note given by one J. E. Youtz, in payment of stock in complainant corporation to the value of \$11,000.00, and that as a preliminary to said suit, the stock of said J. E. Youtz in complainant corporation given as collateral security for said note was sold as a pledge without notice of sale, for the sum of one cent a share, notwithstanding the fact that said stock was worth \$10.00 a share, and that the said stock was bid in at the sale in the presence of said Leroy H. Civile, representing the defendant corporation; that the said stock was sold to a man named Wiser, and was not bid in for the benefit of defendant corporation.

(Signed) P. A. PARKER.

Subscribed and sworn to before me this 11h of April, 1914.

[Notarial Seal]

(Signed) AFUE McDOWELL,
Notary Public in and for the County of Los Angeles,
State of Cal.

My commission expires March 24, 1916. [59]

MEMORANDUM OF AGREEMENT

Made this 21st day of October, 1913.

FIRST: The Fireman's Fund Insurance Company agrees to reinsure all the outstanding fire liability of the Bankers' Fire Insurance Company and the Phoenix Fire Underwriters of Phoenix, Arizona, as of 12 o'clock, noon, this 21st day, of October, 1913, the liability assumed by the Fireman's Fund attaching only to the uncanceled and unexpired policies of said Companies mentioned in the attached list furnished by the representatives of said Companies.

SECOND: Any policies in said list which are written below the rates of the Board of Underwriters of the Pacific shall, for the purpose of computing the premium to become due the Fireman's Fund Insurance Company under this memorandum, be restored to full Board rates.

THIRD: In case it is found that any of the policies mentioned in the enclosed list were written for periods of three (3) years contrary to the rules of the Board of Underwriters, then in such case the premiums on such policies, for the purpose of computing the amount to become due the Fireman's Fund hereunder, shall be figured on the basis of three or five annual rates, as the case may be.

FOURTH: Should it develop that there are any taxes or licenses pending on said premiums against the re-insuring companies, it is understood that said re-insuring companies shall liquidate such taxes.

FIFTH: There shall be made up and completed by said re-insuring companies within Thirty (30) days of date hereof, triplicate schedules of the risks covering under the terms of this re-insurance memorandum. Said schedules shall contain the following headings and memoranda: [60]

Number of policy.

Name of assured.

Specific description of risk.

Kind of property.

County and State.

The beginning, term, expiration, amount and premium of the original policy.

Also the amount reinsured hereunder, the unexpired term of the re-insurance, the date of expiration, and the *pro rata* unearned premium on each policy, as per sample heading furnished the representatives of the re-insuring companies.

SIXTH: There shall be paid to the Fireman's Fund Insurance Company the *pro rata* premiums for the unexpired terms of said policies, computed as above indicated, less a commission of 25%, and as an evidence of good faith the representatives of the re-insuring companies have this date paid to the Fireman's Fund Insurance Company cashier's checks aggregating Thirty-six Hundred and Fifty Dollars (\$3650), receipt of which is hereby acknowledged by the Fireman's Fund.

SEVENTH: If upon the completion of the schedules, and the determination of the amount to become due the Fireman's Fund Insurance Company hereunder, which determination must be made within Thirty (30) days from date hereof, it shall be found that an additional sum is due said Fireman's Fund the said re-insuring companies guarantee to promptly pay said amount; and if it should be found that the amount of Thirty-six Hundred and Fifty Dollars (\$3650) already paid to the Fireman's Fund is more than the said Fireman's Fund is entitled to under said determination, then said Fireman's Fund will promptly repay the difference to said re-insurers.

EIGHTH: The said re-insuring companies hereby agree not to re-enter the insurance business for a period of at least Five (5) years from this date.

NINTH: In case any of the assured mentioned in the enclosed list should cancel their policies subsequent to the date [61] hereof, or if the re-insuring companies above mentioned should find it expedient to make any such cancellations, it is understood that the Fireman's Fund will repay said re-insuring companies the amount of return premium properly determined, less the re-insurance commission of 25% provided for herein.

TENTH: If this agreement and all matters required therein to be performed on the part of the re-insuring companies, are not so performed within 30 days of date hereof this agreement shall cease and determine, and the Fireman's Fund be released from further liability under its re-insurance covering, and said Fireman's Fund shall be entitled to *pro rata*

premium on each policy for the time this agreement has been in force, and the balance of the money received to be returned to said re-insuring companies.

ELEVENTH: The re-insuring companies agree to furnish the Fireman's Fund Insurance Company with all such original data, records, maps and papers relating to the risks embraced in the attached schedule, as may be in their power.

TWELFTH: The re-insuring companies above mentioned hereby agree not to furnish a memorandum of the expiration of the policies embraced within this agreement to any other parties except the Fireman's Fund Insurance Company or its representative.

FIREMAN'S FUND INSURANCE COMPANY,

By BERNARD FAYMONVILLE,

Vice-President.

BANKERS' FIRE INSURANCE COMPANY,

By LEROY H. CIVILLE,

President.

PHOENIX FIRE UNDERWRITERS,

By LEROY H. CIVILLE,

President.

I have read the foregoing, and as President of the Merchants and Insurers' Reporting Company, which is the holding company of the two re-insuring companies above mentioned, [62] and also individually on my own behalf, undertake and guarantee the performance in good faith on behalf of the re-

insuring companies above mentioned.

(Signed) JOHN CASTERA. [63]

Before the

ARIZONA CORPORATION COMMISSION.

Insurance Department Docket #1.

In re BANKERS' FIRE INSURANCE COM
PANY.

It appearing to this commission from a partial examination of the affairs of the Bankers' Fire Insurance Company that the interests of the stockholders policy-holders and others in interest would be better protected if the assets of said Company as of October 21, 1913, shall remain intact:

IT IS THEREFORE ORDERED that the Bankers' Fire Insurance Company be and the same is hereby ordered to cease and desist from further impairment of the assets of said Company, and shall hold intact all of said Company's moneys, securities and assets of whatsoever kind and character, and shall refrain from making or entering into any contract or agreements, and from doing any business, and from the payment of any salaries to its officers or any other persons, pending the completion of the examination of the affairs of said Company by this Commission.

Done at Phoenix, Arizona, this 24th day of October, 1913.

ARIZONA CORPORATION COMMISSION.

W. P. GEARY,
Chairman.

[Seal]

A. W. COLE,
Commissioner.

Attest: FRANK DE SOUSA,
Secretary.

[Endorsements]: In the United States District Court for the District of Arizona. Merchants & Insurers' Reporting Company, Complainant, vs. Bankers' Fire Insurance Company, Defendant, F. A. Jones, Intervenor. State of California, County of Los Angeles,—ss. Affidavit on Behalf of Intervener in Support of His Petition for a Receiver for Defendant Corporation. [64]

[Endorsements]: No. E.—15 (Phoenix). In the United States District Court for the District of Arizona. Merchants & Insurers' Reporting Co., Complainant, vs. Bankers' Fire Insurance Co., Defendant. Petition of F. A. Jones in Intervention. Recd. copy of within this 13th day of April, 1914. Struckmeyer & Jenckes, Attys. for Complainant. Copy received 4/13/14. Sloan, Seabury & Westervelt, Attys. for Defendant, by DeRiemer. Filed Apr. 13, 1914, at — M. Geo. W. Lewis, Clerk. By R. E. L. Webb, Deputy. Law offices: Stoneman & Ling, 405, 406 and 407 Goodrich Block, Phoenix, Arizona. [65]

*In the United States District Court for the District
of Arizona.*

MERCHANTS & INSURERS' REPORTING
COMPANY,

Complainant,

vs.

BANKERS' FIRE INSURANCE COMPANY,
Defendant.

**Affidavit of John Castera, F. W. Boynton, H. Y.
Stanley, W. A. Johnston and Marshall Stimson.**

State of California,
County of Los Angeles,—ss.

John Castera, F. W. Boynton, H. Y. Stanley, W.
A. Johnston and Marshall Stimson, being first duly
sworn, each for himself and not for the others,
deposes and says:

I.

That the Merchants and Insurers' Reporting Com-
pany, a corporation, the complainant in this action,
is a corporation organized under the laws of the
State of California; and, that its articles of incor-
poration provide for a board of five (5) directors;
that the above-named constitute the said Board of
Directors of said corporation.

II.

That the said Merchants and Insurers' Reporting
Company owns all of the capital stock of the said
Bankers' Fire Insurance Company, defendant, a
corporation of the State of Arizona, except three
(3) shares held by the directors of said Bankers'

Fire Insurance Company. That the said Board of Directors of the said Merchants and Insurers' Reporting Company unanimously passed a motion directing the directors of the Bankers' Fire Insurance Company to settle all the liabilities of the said Bankers' Fire Insurance Company; to turn over the assets of said Bankers' [66] Fire Insurance Company and to dissolve the said Bankers' Fire Insurance Company. That said instructions were communicated to the directors of the Bankers' Fire Insurance Company; and pursuant thereto they proceeded to pay or cancel all of the debts and liabilities of the said Bankers' Fire Insurance Company. That a stockholders' meeting of the Bankers' Fire Insurance Company was duly held thereafter, and that every share of stock of said corporation was duly represented at said meeting. The said stockholders representing the shares of stock in said corporation voted *and voted* and unanimously resolved to dissolve the said Bankers' Fire Insurance Company.

III.

That the above-named persons, as directors of the said Merchants and Insurers' Reporting Company, are ready to receive the assets in kind of the defendant, Bankers' Fire Insurance Company. That the said Bankers' Fire Insurance Company has now no debts or liabilities, and the assets of the same consist of notes, mortgages and bonds, largely covering property in the State of California. That the directors of the Merchants and Insurers' Reporting Company desire said assets to be turned over to the

said Merchants and Insurers' Reporting Company in kind, and without the delay and expense incidental to reducing the same to cash.

IV.

That no expense has been incurred by the said Bankers' Fire Insurance Company, beyond the necessary legal expenses, since October 1st, 1913; and that the said Board of Directors of the said Merchants and Insurers' Reporting Company desire to dissolve the said Bankers' Fire Insurance Company, without the delay and expense of a receiver being appointed therefor. [67]

JOHN CASTERA.

F. W. BOYNTON.

[Seal]

H. Y. STANLEY.

W. A. JOHNSTON.

MARSHALL STIMSON.

Subscribed and sworn to before me this 16th day of April, 1914.

F. W. FELLOWS,

Notary Public in and for Los Angeles County, State of California. [68]

[Endorsements]: E.—15. In the United States District Court, for the District of Arizona. Merchants & Insurers' Rep. Co. vs. Bankers' Fire Ins. Co. Affidavit. Filed Apr. 20, 1914. Geo. W. Lewis, Clerk. By R. E. L. Webb, Dep. F. C. Struckmeyer, Jos. S. Jenckes, Solicitors for Complainant. R. E. Sloan, W. M. Seabury, James Westervelt, Solicitors for Defendant, Phoenix, Arizona. Service of a copy of within affidavit this 18th day of April, 1914, is acknowledged. Reese M. Ling,

George J. Stoneman, M. C. W., Solicitors of Interveners. [69]

*In the United States District Court for the District
of Arizona.*

No. E.—15.

MERCHANTS & INSURERS' REPORTING
COMPANY,

Complainant,

vs.

BANKERS' FIRE INSURANCE COMPANY,

Defendant.

**Joint Answer of Plaintiff and Defendant to Petition
in Intervention of F. A. Jones, Verified April
9, 1914.**

Come now the plaintiff and defendant above named, jointly, and in answer to the petition in intervention of F. A. Jones, verified April 9, 1914:

1.

Demur to said petition upon the ground that the said petition in intervention fails to state facts showing that the petitioner Jones, or any other of the persons named in said petition for whom it is alleged that the said Jones had authority to appear in the above-entitled cause, has any interest in the subject of the litigation herein, and fails to state facts sufficient to constitute any cause or right of intervention in the above-entitled cause and fails to state facts sufficient to constitute any cause cognizable in equity herein, but that it appears on the face of said petition that neither the said F. A. Jones nor any of the

persons mentioned and described in paragraph 2 of said petition are necessary or proper parties to the above-entitled cause, but, on the contrary, the said Jones and each of the said persons is and are unnecessary and [70] improper parties thereto, and it further appears on the face of said petition that the intervenors have wholly failed to comply with Equity Rule 27.

And should the foregoing demurrer be overruled without waiving their exceptions thereto and reserving each and all of the foregoing objections and exceptions to the matters above stated, plaintiff and defendant:

2.

Admit that the said intervenor, F. A. Jones, was and now is a stockholder of and in the plaintiff above named to the extent of 50 shares of stock.

3.

Deny any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 2 of said petition in intervention, and therefore deny the same.

4.

Deny that ever since the month of February or at any other time the officers of the defendant have been drawing large sums of money from the treasury of said company for alleged services and have paid out large sums of money to attorneys as attorneys' fees and that said officers of said company have expended large sums of money for alleged traveling expenses, and deny that there has been any expenditure of said fund by the defendant to the great loss

of the stockholders either in said company or in the plaintiff company, and in this connection plaintiff and defendant allege that the only moneys expended by the defendant company since February, 1913, have been legitimate and proper expenditures [71] in the shape of necessary salaries, traveling expenses and other legitimate obligations of the defendant above named, and that each and all of the expenditures so made have been with the full knowledge, consent and approval of the plaintiff above named.

Deny that the officers of the defendant company have at any time since February, 1913, wasted the assets of the company, and deny that said officers have grossly mismanaged, or mismanaged at all, the affairs of the company to a large, or any, extent.

Admit that on or about September 15, 1913, various persons claiming to be stockholders in the plaintiff above named filed a petition with the Arizona Corporation Commission in the city of Phoenix, Arizona, copy of which purports to be annexed to the said petition in intervention herein, and for greater certainty refer thereto.

Deny each and every other allegation in paragraph IV of said petition in intervention not hereinbefore specifically admitted or denied.

5.

Deny each and every allegation contained in paragraph V of said petition in intervention, and plaintiff and defendant allege in this connection that the sole and only purpose for the institution and maintenance of this action was and is to procure the orderly and lawful dissolution of the defendant company,

and deny that the officers of the defendant company mentioned in the bill of complaint herein have been instrumental or engaged or have otherwise participated in the dissipation of any of the funds or assets [72] of the defendant company; and that prior to the institution of this action negotiations had been carried on by plaintiff and defendant which had resulted in the execution of a preliminary contract providing for the reinsurance in a strong and responsible company of all of defendant's outstanding insurance risks, and that all of defendant's other obligations of which it has any knowledge have been paid.

6.

Plaintiff and defendant allege on information and belief that the purpose of said petition in intervention, among other things, is to enable the said petitioner, F. A. Jones, to obtain control and management of the above-entitled cause, and that said intervention is not made in subordination to and in recognition of the propriety of the main proceeding herein, but is interposed solely for the purpose of securing the appointment of a receiver herein at great expense to the plaintiff and defendant above named, and for no useful or lawful purpose whatsoever.

WHEREFORE, plaintiff and defendant pray that the said intervening petition be dismissed with costs.

F. C. STRUCKMEYER,

JOS. S. JENCKES,

Attorneys for Complainant.

RICHARD E. SLOAN,

WM. M. SEABURY,

JAMES WESTERVELT,

Attorneys for Defendant. [73]

[Affidavit of John Castera.]

State of California,

County of Los Angeles,—ss.

John Castera, being duly sworn, deposes and says: That he is President of the Merchants and Insurers' Reporting Company, the complainant in the above-entitled cause; that he has read the foregoing answer to the petition in intervention, knows the contents thereof and that the same are true, including the denials therein contained, of his own knowledge, except to the matters therein stated upon information and belief, and that as to those matters he believes them to be true.

Deponent further says that the reason this verification is made by deponent and not by complainant is that complainant is a corporation and deponent is President thereof, and the sources of deponent's knowledge and the grounds of his belief are corporate records of the complainant in deponent's possession and transactions in which deponent has been concerned as President of complainant.

(Signed) JOHN CASTERA.

Subscribed and sworn to before me this 2st day of April, 1914.

[Seal]

(Signed) JOS. FILHOL,
Notary Public.

My commission expires Nov. 17th, 1917. [74]

[Affidavit of Leroy H. Civile.]

State of California,
County of Los Angeles,—ss.

Leroy H. Civile, being duly sworn, deposes and says: That he is President of the Bankers' Fire Insurance Company, the defendant in the above-entitled cause; that he has read the foregoing answer to the petition in intervention, knows the contents thereof and that the same are true, including the denials therein contained, of his own knowledge, except as to the matters therein stated upon information and belief, and that as to those matters he believes them to be true.

Deponent further says that the reason this verification is made by deponent and not by defendant is that defendant is a corporation and deponent is the President thereof, and the sources of deponent's knowledge and the grounds of his belief are corporate records of the defendant in deponent's possession and transactions in which deponent has been concerned as such President of defendant.

LEROY H. CIVILLE.

Subscribed and sworn to before me this 21st day of April, 1914.

[Seal]

JOS. FILHOL,
Notary Public.

My commission expires November 17th, 1917.
[75]

[Endorsements]: Service of a copy of within joint answer is acknowledged this 25th day of April, 1914.

GEORGE J. STONEMAN,

REESE M. LING,

Solicitors for Intervenor.

In the United States District Court for the District of Arizona. Merchants & Insurers' Reporting Company vs. Bankers' Fire Insurance Co. Joint Answer of Complainant and Defendant. Filed April 25, 1914. George W. Lewis, Clerk. F. C. Struckmeyer, Jos. S. Jenckes, Solicitors for Complainant. R. E. Sloan, W. M. Seabury, James Westervelt, Solicitors for Defendant. [76]

[Minutes of Court—April 25, 1914—Order
Overruling Demurrer, etc.]

*In the United States District Court for the District
of Arizona.*

MINUTE ENTRY APPEARING UNDER DATE
OF APRIL 25th, 1914.

No. E.—15.

MERCHANTS & INSURERS' REPORTING CO.,
Plaintiff,

vs.

BANKERS' FIRE INSURANCE CO.,
Defendant.

The demurrers heretofore filed herein are hereby overruled and the cause is submitted to the Court for

its decision and judgment upon the pleadings, petitions and affidavits of the parties hereto and the intervenors herein. [77]

*In the United States District Court for the District
of Arizona.*

No. E.—15.

MERCHANTS & INSURERS' REPORTING
COMPANY,

Complainant,

vs.

BANKERS' FIRE INSURANCE COMPANY,
Defendant.

Order Appointing Receiver.

This cause coming on to be heard on the 1st day of July, 1914, the same being a day of the regular April term of this court, upon the verified petition for intervention of F. A. Jones, as a stockholder of the above-named defendant, for himself and all other stockholders of the defendant, and the demurrer of the defendant to such petition and upon the hearing of the argument of the counsel representing the respective parties in support of said petition for intervention and said demurrer, the same being by the Court considered, and the demurrer being by the Court overruled, and upon the hearing of the motion of the defendant to dismiss said petition for intervention, and the answer of the defendant thereto, and after hearing evidence, both oral and documentary, in support of the said petition for intervention, and against the same, and the argument of counsel, and

fully considering the same, it was by the Court ordered, adjudged and decreed that said petition for intervention should be allowed and the prayer thereof should be granted, and it appearing that it is necessary and proper that a receiver be appointed for the said defendant, Bankers' Fire Insurance Company, and that said receiver be authorized, directed and empowered to do and perform all such acts as may be necessary and proper to be done for the purpose of caring for and conserving the assets [78] of defendant, wherever the same may be found, taking the same into his possession, and the winding up of the affairs of said defendant, and the returning of all said assets into this court, and that the defendant and each and all of its officers, agents and attorneys and employees be restrained until the further order of this court from the doing and performing of any act or acts in the management, operation or control of the defendant as may in any manner defeat or impair the rights of the defendant or said petitioner in intervention, and from in any manner doing any further business except such as may be done by said receiver and pursuant to the authority herein conferred, and under the direction of the further orders of this Court.

IT IS NOW THEREFORE FURTHER ORDERED, ADJUDGED AND DECREED that Ly-sander Cassidy, a resident of Phoenix, in the State of Arizona, be and he is hereby appointed as Receiver of said defendant, Bankers' Fire Insurance Company, upon his qualifying and the giving of a bond in the sum of Three Thousand (\$3,000.00) Dollars,

with full power and authority to do any and all of the acts necessary in the premises for the full and complete performance of this order and subject to the further orders and rules of this Court in the premises.

Done in open court this 1st day of July, 1914.

(Signed) WM. H. SAWTELLE,
United States District Judge.

[Endorsements]: E—15. In the United States District Court for the District of Arizona. Merchants & Insurers' Reporting Company, Complainant, vs. Bankers' Fire Insurance Co., Defendant. Order Appointing Receiver. Filed Jul. 1, 1914, at — M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. Law Offices: Stoneman & Ling, 405, 406 and 407 Goodrich Block, Phoenix, Arizona. [79]

*District Court of the United States, for the District
of Arizona.*

MERCHANTS & INSURERS' REPORTING
COMPANY,

Complainant,

vs.

BANKERS' FIRE INSURANCE COMPANY,
Defendant.

Notice of Appeal.

F. A. Jones, having filed his amended petition for leave to intervene in the above-entitled cause, on or about December 20, 1913, and having on or about said date moved this Court for leave to intervene in said

cause, the said Court having on or about the 8th day of April, 1914, granted said relief, and entered an order herein as of said date overruling the demurrer to said amended petition and permitting said F. A. Jones to intervene herein and on or about the 25th day of April, 1914, the said Court having overruled the demurrer of the complainant and defendant to the petition in intervention of said F. A. Jones herein by order entered as of said date, and said Court having on the first day of July, 1914, appointed, on the motion of said F. A. Jones, a receiver herein by order entered as of said date,—

NOW, THEREFORE, come the said Merchants & Insurers' Reporting Company and Bankers' Fire Insurance Company, and hereby appeal from the said order of April 8, 1914, from said order of April 25, 1914, and from said order of July 1, 1914, so made and entered as aforesaid, and also from each and every part thereof, to the Circuit Court [80] of Appeals in and for the 9th Circuit.

Dated, Phoenix, Arizona, this 18th day of July, 1914.

F. C. STRUCKMEYER,
JOS. S. JENCKES,

Solicitors for Merchants & Insurers' Reporting
Company.

R. E. SLOAN,
W. M. SEABURY,
JAMES WESTERVELT,

Solicitors for Bankers' Fire Insurance Company.

[Endorsements]: E—15. Dist. Court of the U. S.
District of Arizona. Merchants & Insurers' Rep.

Company vs. Bankers' Fire Ins. Co. Notice of Appeal. Filed Jul. 18, 1914, at — M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. Sloan & Westervelt, Fleming Building, Phoenix, Arizona.
[81]

*District Court of the United States for the District
of Arizona.*

MERCHANTS & INSURERS' REPORTING
COMPANY,

Complainant,

vs.

BANKERS' FIRE INSURANCE COMPANY,
Defendant.

Petition for an Order Allowing Appeal.

To the Honorable WILLIAM H. SAWTELLE,
Judge of the District Court in and for the Dis-
trict of Arizona:

The above-named, Merchants & Insurers' Reporting Company and Bankers' Fire Insurance Company respectively, complainant and defendant herein, feeling themselves aggrieved by the order of this Honorable Court made and entered herein on April 8, 1914, whereby the demurrer to the amended petition of F. A. Jones for leave to intervene herein was overruled and said F. A. Jones was allowed to intervene herein by the order made and entered herein on April 25, 1914, whereby the demurrer of complainant and defendant to the petition in intervention herein of said F. A. Jones was overruled and by the order made and entered herein on July 1st, 1914,

whereby Lysander Cassidy, Esq., of Phoenix, Arizona, was appointed receiver of said Bankers Fire Insurance Company, do hereby appeal from said orders of April 8, 1914, April 20, 1914, and July 1, 1914, and each and every part of each of said orders to the Circuit Court of Appeals in and for the 9th Judicial Circuit for the reasons specified in the assignment of errors, which is filed herein and your petitioner prays that its appeal be allowed and that [82] such citation issue as is provided by law, and that a transcript of the records, proceedings and papers upon which said order of April 8, 1914, said order of April 25, 1914, and said order of July 1, 1914, were based, duly authenticated may be sent to the United States Circuit Court of Appeals in and for the 9th Judicial Circuit, sitting at the City of San Francisco, State of California, and your petitioner further prays that the proper order touching the security required by them to perfect their said appeal herein be made, and desiring to supersede the execution of said order of July 1, 1914, petitioners here tender bond in such amount as the Court may require for such purpose and pray that with the allowance of the appeal a supersedeas be issued.

F. C. STRUCKMEYER,

JOS. S. JENCKES,

Solicitors for Merchants & Insurers' Reporting
Company.

R. E. SLOAN,

W. M. SEABURY,

JAMES WESTERVELT,

Solicitors for Bankers' Fire Insurance Company.

[Endorsements]: E.—15. District Court of U. S. District of Arizona. Merchants & Insurers' Reporting Co. vs. Bankers' Fire Ins. Co. Petition for an Order Allowing Appeal. Filed Jul. 18, 1914, at — M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy Sloan, Seabury & Westervelt, Fleming Building Phoenix, Arizona. [82½]

District Court of the United States, for the District of Arizona.

MERCHANTS & INSURERS' REPORTING
COMPANY,

Complainant,

vs.

BANKERS' FIRE INSURANCE COMPANY,
Defendant.

Assignment of Errors.

And now on this 18th day of July, 1914, come Merchants & Insurers' Reporting Company, complainant herein, by its solicitors, F. C. Struckmeyer and Joseph S. Jenckes, and Bankers' Fire Insurance Company, defendant herein, by its solicitors, R. E. Sloan, W. M. Seabury and James Westervelt, and complain and allege:

That the order entered herein on the 8th day of April, 1914, overruling the demurrer of the defendant to the amended petition of F. A. Jones filed herein December 20, 1913, for himself and in alleged behalf of all other similarly situated stockholders of the Merchants & Insurers' Reporting Company, th

complainant herein, for leave to intervene herein, and permitting the filing of the petition in such intervention herein; the order entered herein on the 25th day of April, 1914, overruling the demurrers of the complainant and defendant to the petition in intervention herein of said F. A. Jones for himself and in alleged behalf of all other similarly situated stockholders of the Merchants & Insurers' Reporting Company, the complainant herein, and the order entered herein on the first day of July, 1914, appointing Lysander Cassidy, Esq., as receiver of the Bankers' Fire Insurance Company, the defendant herein, upon the application of [83] said petitioner, are erroneous and unjust to the said Merchants & Insurers' Reporting Company and the said Bankers' Fire Insurance Company, who duly excepted to each and all of said orders and to all the parts thereof, and that the learned District Court of the United States in and for the District of Arizona erred in making said orders of the 8th day of April, 1914, the 25th day of April, 1914, and the 1st day of July, 1914, respectively, in each and all of the following particulars:

I.

The said Court erred in making and entering said order of April 8, 1914, whereby said Court overruled the demurrer of the defendant to the amended petition of F. A. Jones for himself and in alleged behalf of all other similarly situated stockholders of said Merchants & Insurers' Reporting Company, and permitted said F. A. Jones to intervene herein, because said amended petition fails to state facts

sufficient to constitute a cause of equitable cognizance or facts sufficient to constitute cause for intervention herein by said F. A. Jones or any of the other persons therein named.

FIRST: For the reason that a minority stockholder of the complainant has no cause of action against anyone for the alleged extravagance and waste of the directors of the defendant, the stock of which is alleged to be entirely owned by the complainant, in that said cause of action is vested in the complainant or defendant companies against the individual directors of the defendant company.

SECOND: For the reason that said amended petition does not show that the interest of said F. A. Jones [84] or of any other persons therein named in the assets of the defendant are of a sufficiently direct and immediate character to constitute cause for the intervention herein of said F. A. Jones or such other persons, or that said F. A. Jones or such other persons have any interest whatever in the subject of this litigation.

THIRD: For the reason that it appears on the face of the amended petition that neither said F. A. Jones nor any other person therein named is a necessary or proper party to the above-mentioned cause, but, on the contrary, that said Jones and each of said persons is an unnecessary and improper party thereto, because their interests as stockholders of the complainant and the interests of those in the same class are fully and adequately represented in this action both in law and equity by the complainant.

FOURTH: For the reason that said amended petition does not set forth with particularity the efforts of the intervenors to secure such action as he desires on the part of the managing directors of the complainant, or of the stockholders of the complainant, and the causes of his failure to obtain such action, or the reasons for not making such effort, as required by the provisions of Equity Rule XXVII.

FIFTH: For the reason that it appears on the face of said amended petition that the only function which said intervenors seek to perform is to move for the appointment of a receiver of the defendant company and there is no allegation contained in the complaint or in said amended petition that the defendant is insolvent, nor is there any allegation of fraud on the part of defendant's officers and directors or anybody else. [85]

SIXTH: For the reason that it appears on the face of said amended petition that the only function which said intervenor seeks to perform is to move for the appointment of a receiver of the defendant company.

SEVENTH: For the reason that said amended petition does not set forth or allege that the complainant has refused to take the action therein alleged to be desired by its stockholders, to wit, the dissolution of the defendant company and the distribution of its assets, but, on the contrary, it appears therefrom that the complainant is proceeding in the most expeditious and inexpensive manner to dissolve said defendant company.

EIGHTH: For the reason that said amended petition does not set forth or allege any fraudulent or improper act or breach of duty on the part of the complainant or its officers or directors and fails to state facts sufficient to constitute any cause or right of intervention in the above-entitled cause and fails to state facts sufficient to constitute any cause cognizable in equity herein.

II.

The Court erred in overruling by said order of April 25, 1914, the demurrer of the defendant to the petition in intervention filed by F. A. Jones for himself and in alleged behalf of all other stockholders similarly situated of the Merchants & Insurers' Reporting Company, the complainant herein, because said petition in intervention fails to state facts sufficient to constitute cause or right of intervention herein by said F. A. Jones or any other persons therein named, and fails to state facts sufficient to constitute any cause cognizable in equity herein:

FIRST: For the reason that a minority stockholder of the complainant has no cause of action against any one for the alleged extravagance and waste of the directors [86] of the defendant, the stock of which is alleged to be entirely owned by the complainant, in that said cause of action is vested in the complainant or defendant companies against the individual directors of the defendant company.

SECOND: For the reason that the petition in intervention does not show that the interest of said F. A. Jones or of any other persons therein named

in the assets of the defendant are of a sufficiently direct and immediate character to constitute cause for the intervention herein of said F. A. Jones or such other persons, or that said F. A. Jones or such other persons have any interest whatever in the subject of this litigation.

THIRD: For the reason that it appears on the face of the petition in intervention that neither said F. A. Jones nor any other person therein named is a necessary or proper party to the above-entitled cause, but, on the contrary, that said Jones and each of said persons is an unnecessary and improper party thereto, because their interests as stockholders of the complainant and the interests of those in the same class are fully and adequately represented in this action both in law and equity by the complainant.

FOURTH: For the reason that said petition in intervention does not set forth with particularity the efforts of the intervenor to secure such action as he desires on the part of the managing directors of the complainant, or of the stockholders of the complainant, and the causes of his failure to obtain such action, or the reasons for not making such effort, as required by the provisions of Equity Rule XXVII.

FIFTH: For the reason that it appears on the face of said petition in intervention that the only function [87] which said intervenor seeks to perform is to move for the appointment of a receiver of the defendant company and there is no allegation contained in the complaint or in said petition in in-

tervention that the defendant is insolvent, nor is there any allegation of fraud on the part of the defendant's officers and directors or anybody else.

SIXTH: For the reason that it appears on the face of said petition in intervention that the only function which said intervenor seeks to perform is to move for the appointment of a receiver of the defendant company.

SEVENTH: For the reason that said petition in intervention does not set forth or allege that the complainant has refused to take the action therein alleged to be desired by its stockholders, to wit, the dissolution of the defendant company and the distribution of its assets, but, on the contrary, it appears therefrom that the complainant is proceeding in the most expeditious and inexpensive manner to dissolve said defendant company.

EIGHTH: For the reason that said petition in intervention does not set forth or allege any fraudulent or improper act or breach of duty on the part of the complainant or its officers or directors and fails to state facts sufficient to constitute any cause or right of intervention in the above-entitled cause and fails to state facts sufficient to constitute any cause cognizable in equity herein.

III.

The Court erred in appointing a Receiver of the Bankers' Fire Insurance Company, the defendant herein, by order entered July 1st, 1914, upon the application of F. A. Jones for himself and in alleged behalf of all other similarly situated stockholders of said Merchants & Insurers' [88] Reporting Com-

pany, the complainant herein, in each and all of the following particulars:

FIRST: Because the complainant's bill in equity herein was duly filed and served on the 25th day of October, 1913, praying for a dissolution of the defendant and the appointment of its existing directors as its trustees for the purpose of dissolving and winding up the defendant, and that on the same day defendant's answer was duly filed and served herein admitting the truth of each and every allegation contained in the complaint herein and joining in the prayer of the complaint for a dissolution of the defendant, and that thereafter, on November 12, 1913, and prior to the filing of the petition of said F. A. Jones for leave to intervene, a hearing was had herein before the Hon. Wm. H. Sawtelle, Judge of the United States District Court, and that at said hearing after the allegations of the complaint had been proved by competent evidence the defendant by its counsel joined in the prayer for dissolution and the directors of the defendant company offered to the Court to serve as trustees of the properties of the defendant for the purpose of the dissolution of the defendant and the winding up of its affairs in accordance with the directions of the Court and upon such bond as the Court might require without compensation, and that therefore there was no right or cause for the appointment of a receiver of the defendant.

SECOND: Because the petition in intervention herein and the affidavit of P. A. Parker filed in support thereof, upon which the application for the

intervention that the defendant is insolvent, nor is there any allegation of fraud on the part of the defendant's officers and directors or anybody else.

SIXTH: For the reason that it appears on the face of said petition in intervention that the only function which said intervenor seeks to perform is to move for the appointment of a receiver of the defendant company.

SEVENTH: For the reason that said petition in intervention does not set forth or allege that the complainant has refused to take the action therein alleged to be desired by its stockholders, to wit, the dissolution of the defendant company and the distribution of its assets, but, on the contrary, it appears therefrom that the complainant is proceeding in the most expeditious and inexpensive manner to dissolve said defendant company.

EIGHTH: For the reason that said petition in intervention does not set forth or allege any fraudulent or improper act or breach of duty on the part of the complainant or its officers or directors and fails to state facts sufficient to constitute any cause or right of intervention in the above-entitled cause and fails to state facts sufficient to constitute any cause cognizable in equity herein.

III.

The Court erred in appointing a Receiver of the Bankers' Fire Insurance Company, the defendant herein, by order entered July 1st, 1914, upon the application of F. A. Jones for himself and in alleged behalf of all other similarly situated stockholders of said Merchants & Insurers' [88] Reporting Com-

pany, the complainant herein, in each and all of the following particulars:

FIRST: Because the complainant's bill in equity herein was duly filed and served on the 25th day of October, 1913, praying for a dissolution of the defendant and the appointment of its existing directors as its trustees for the purpose of dissolving and winding up the defendant, and that on the same day defendant's answer was duly filed and served herein admitting the truth of each and every allegation contained in the complaint herein and joining in the prayer of the complaint for a dissolution of the defendant, and that thereafter, on November 12, 1913, and prior to the filing of the petition of said F. A. Jones for leave to intervene, a hearing was had herein before the Hon. Wm. H. Sawtelle, Judge of the United States District Court, and that at said hearing after the allegations of the complaint had been proved by competent evidence the defendant by its counsel joined in the prayer for dissolution and the directors of the defendant company offered to the Court to serve as trustees of the properties of the defendant for the purpose of the dissolution of the defendant and the winding up of its affairs in accordance with the directions of the Court and upon such bond as the Court might require without compensation, and that therefore there was no right or cause for the appointment of a receiver of the defendant.

SECOND: Because the petition in intervention herein and the affidavit of P. A. Parker filed in support thereof, upon which the application for the

appointment of a receiver of the defendant herein was made, contain no allegation that the defendant is insolvent or tending to show that defendant is insolvent, or that the officers or directors or those in control of the defendant company have been [89] or are guilty of fraud or breach of duty in managing and controlling the defendant's affairs.

THIRD: Because it is set forth in the bill or in the affidavit of John Austera, F. W. Boynton, H. Y. Stanley, W. A. Johnston and Marshall Stimson, directors of the complainant filed herein in opposition to the application for a receiver of the defendant on April 20, 1914, and proved upon the hearing herein and not denied that the defendant is without debts or liabilities, that the complainant is the owner of all the capital stock of the defendant, and that the Board of Directors of the complainant are desirous of dissolving the defendant without the delay and expense of a receivership.

FOURTH: Because neither the intervenor nor the other persons mentioned in the petition in intervention herein who alone seek a receivership for the defendant herein have any interest in the subject matter of this litigation.

WHEREFORE, the said Merchants & Insurers' Reporting Company and Bankers' Fire Insurance Company pray that said orders of April 8, 1914, April 25, 1914, and July 1, 1914, be reversed for the errors herein assigned, and that the learned Court below be directed to dismiss the receiver of the Bankers' Insurance Company and that the said Merchants & Insurers' Reporting Company and Bank-

ers' Fire Insurance Company have such other and further relief in the premises as to this Court may seem proper.

F. C. STRUCKMEYER and
JOSEPH S. JENCKES,

Solicitors for Merchants & Insurers' Reporting
Company.

R. E. SLOAN,
WM. M. SEABURY, and
JAMES WESTERVELT,

Solicitors for Bankers' Fire Insurance Co. [90]

[Endorsements]: E.—15. District Court of U. S.,
State of Arizona. Merchants & Insurers' Rep. Co.
vs. Bankers' Fire Ins. Co. Assignment of Errors.
Filed Jul. 18, 1914, at — M. George W. Lewis,
Clerk. By R. E. L. Webb, Deputy. Sloan, Seabury
& Westervelt, Fleming Building, Phoenix, Arizona.
[91]

*District Court of the United States for the District
of Arizona.*

MERCHANTS & INSURERS' REPORTING
COMPANY,

Complainant,

vs.

BANKERS' FIRE INSURANCE COMPANY,
Defendant.

**Order Allowing Appeal and Fixing Amount of
Supersedeas Bond.**

It is hereby ordered that an appeal in the above-
entitled cause to the Circuit Court of Appeals of the

9th Circuit be and is hereby allowed as prayed and that it operate as a supersedeas, and that the order of the District Court of the United States for the District of Arizona herein, dated the first day of July, 1914, be, and it is hereby superseded pending said appeal and until the same is finally heard and determined upon the appellant's, Merchants & Insurers' Reporting Company and Bankers' Fire Insurance Company, filing a bond in the sum of Five Thousand Dollars, with sufficient surety, conditioned as required by law, and that if the said Merchants & Insurers' Reporting Company and Bankers' Fire Insurance Company, do prosecute the same to effect and if they fail to make their appeal good, shall pay and answer all damages, costs, charges and interest in the said cause, then the said obligation to be void.

Done in open court this 18th day of July, 1914.

WM. H. SAWTELLE,

Judge of the District Court of the United States for the District of Arizona. [92]

[Endorsements]: E.—15. District Court of U. S., District of Arizona. Merchants & Insurers' Rep. Co. vs. Bankers' Fire Insurance Co. Order Allowing Appeal and Fixing Supersedeas Bond. Filed Jul. 18, 1914, at — M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. Sloan, Seabury & Westervelt, Fleming Building, Phoenix, Arizona. [93]

*District Court of the United States for the District
of Arizona.*

MERCHANTS & INSURERS' REPORTING
COMPANY,

Complainant,

vs.

BANKERS' FIRE INSURANCE COMPANY,
Defendant.

Supersedeas Bond.

KNOW ALL MEN BY THESE PRESENTS:

That we, Merchants & Insurers' Reporting Company and Bankers' Fire Insurance Company, as principals, and National Surety Company, a corporation, organized and existing under and by virtue of the laws of the State of New York, and authorized to do business as a Surety Company in the State of Arizona, as surety, acknowledge ourselves to be indebted jointly and severally to F. A. Jones, Esq., and to Lysander Cassidy, Esq., as Receiver of the Bankers' Fire Insurance Company, for the benefit of said Jones and such other stockholders of Merchants & Insurers' Reporting Company as may be damaged by the pendency of the appeal hereinafter described, in the full sum of Five Thousand (\$5,000) Dollars, conditioned that,

WHEREAS, on or about the 8th day of April, 1914, in the District Court of the United States for the District of Arizona, in an issue pending in that court wherein Merchants & Insurers' Reporting Company was complainant and the Bankers' Fire

Insurance Company was defendant, an order was entered overruling the demurrer to the amended petition of said F. A. Jones for leave to intervene herein and granting to said F. A. Jones leave to intervene in said cause; and [94]

WHEREAS, on or about the 25th day of April, 1914, in said District Court of the United States for the District of Arizona in said cause an order was entered overruling the demurrers of the complainant and defendant to the petition of intervention herein of said F. A. Jones; and

WHEREAS, on or about the first day of July, 1914, in said District Court of the United States for the District of Arizona in said suit, an order was entered appointing Lysander Cassidy receiver of the said Bankers' Fire Insurance Company and the said Merchants & Insurers' Reporting Company having obtained an appeal to the Circuit Court of Appeals in and for the 9th Judicial Circuit from the said order of April 8, 1914, said order of April 25th, 1914, and said order of July 1st, 1914, which has been duly filed in the office of the clerk of the court to reverse the said orders and a citation directed to the said F. A. Jones, Esq., and the said Lysander Cassidy Esq., as receiver of the Bankers' Fire Insurance Company, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit to be holden in the City of San Francisco within thirty days of the date of said citation:

Now, if the said Merchants & Insurers' Reporting Company and Bankers' Fire Insurance Company

shall prosecute their appeal to effect and if they shall fail to make good said appeal and to obtain the reversal of the several orders appealed from, shall answer and pay to the obligees in this bond all damages which they may sustain by reason of the suspension of said orders and stay of proceedings thereon and costs of this appeal, then the above obligation to be void, otherwise to remain in full force and virtue.

And said bond and obligation is upon the further [95] express condition and agreement by the sureties thereto, that in case of a breach of the condition set forth herein, this Court may upon notice to said sureties of not less than ten days proceed summarily in said action or suit in which this bond is given to ascertain the amount which said sureties are bound to pay on account of such breach of said bond and undertaking and render judgment against the said sureties, and each of them, and award execution thereon.

[Seal] MERCHANTS & INSURERS' RE-
PORTING CO.

By JOHN CASTERA,

Pres.

[Seal] BANKERS' FIRE INSURANCE
COMPANY,

By LEROY H. CIVILLE,

President.

NATIONAL SURETY COMPANY,

By CATESBY C. THOM,

Attorney in Fact.

Approved as to form and sufficiency of the surety
this 25th day of August, 1914.

WM. H. SAWTELLE,

Judge of the District Court of the United States for
the District of Arizona. [96]

State of California,

County of Los Angeles,—ss.

On this 31 day of July, in the year one thousand
nine hundred and fourteen, before me, William M.
Curran, a Notary Public in and for said County
and State, residing therein, duly commissioned and
sworn, personally appeared Catesby C. Thom, known
to me to be the duly authorized attorney in fact of
National Surety Company, and the same person
whose name is subscribed to the within instrument
as the attorney in fact of said company, and the said
Catesby C. Thom acknowledged to me that he sub-
scribed the name of National Surety Company
thereto as principal, and his own name as attorney
in fact.

IN WITNESS WHEREOF, I have hereunto set
my hand and affixed my official seal the day and year
in this certificate first above written.

[Notarial Seal]

(Signed) WILLIAM M. CURRAN,

Notary Public in and for Los Angeles County, State
of California.

[Endorsements]: District Court of U. S., District
of Arizona. Merchants & Insurers' Rep. Co. vs.
Bankers' Fire Ins. Co. Supersedeas Bond. Filed
Aug. 26, 1914, at — M. George W. Lewis, Clerk

By R. E. L. Webb, Deputy. Sloan, Seabury & Westervelt, Fleming Building, Phoenix, Arizona. [97]

*In the United States District Court for the District
of Arizona.*

No. E.—15 (Phoenix).

MERCHANTS AND INSURERS' REPORTING
COMPANY,

Complainant,

vs.

BANKERS' FIRE INSURANCE COMPANY,
Defendant.

Praeceptum for Transcript of Record.

To the Clerk of the United States District Court for
the District of Arizona:

You will please prepare a transcript of the complete record in the above-entitled cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, under the appeal to said court in said cause, and include in said transcript the following proceedings, pleadings, papers, records and files, to wit:

Bill in Equity;

Answer;

Amended Petition to Intervene;

Opposition to Amended Petition signed by six
individuals;

Opposition to Amended Petition signed by John
Otto;

100 *Merchants & Insurers' Reporting Co. et al.*

San Francisco, California, to and including the 8th day of September, A. D. 1914.

GEORGE J. STONEMAN,
REESE M. LING,

Attorneys for Intervenor.

R. E. SLOAN,

JAMES WESTERVELT,

Attorneys for Defendant.

Dated at Phoenix, Arizona, this 28th day of August, A. D. 1914. [101]

[Endorsements]: No. E.—15 (Phoenix). In the United States District Court for the District of Arizona. Merchants & Insurers' Reporting Co., Plaintiff, vs. Bankers' Fire Insurance Company, Defendant. F. A. Jones, Intervenor. Stipulation Agreeing to the Enlargement of Time Within Which to File Transcript of Record. Filed Aug. 28, 1914, at — M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. [102]

In the United States District Court for the District of Arizona.

No. E.—15 (Phoenix).

MERCHANTS & INSURERS' REPORTING
COMPANY,

Plaintiff,

vs.

BANKERS' FIRE INSURANCE COMPANY,
Defendant.

F. A. JONES,

Intervenor.

**Order Under Rule 16, Section 1, Enlarging Time to
September 8, 1914, to File Record Thereof and
to Docket Case.**

In accordance with a stipulation of counsel herein, filed August 28, 1914, and good cause therefor appearing,

IT IS ORDERED that the time within which the original certified Transcript of the Record in the above-entitled cause may be filed, and within which the cause may be docketed with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, be, and hereby is enlarged to and including the 8th day of September, A. D. 1914, and that this order be now entered of record as of and for the 18th day of August, A. D. 1914.

(Signed) WM. H. SAWTELLE,
Judge of the United States District Court for the
District of Arizona.

Dated at Tucson, Arizona, this 29th day of August,
A. D. 1914. [103]

[Endorsements]: No. E.—15 (Phoenix). In the United States District Court for the District of Arizona. Merchants & Insurers' Reporting Co., Plaintiff, vs. Bankers' Fire Insurance Company, Defendant. F. A. Jones, Intervenor. Order Enlarging Time Within Which to File Transcript of Record. Filed Aug. 29, 1914, at — M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. [104]

*In the United States District Court for the District
of Arizona.*

No. E.—15 (Phoenix).

MERCHANTS & INSURERS' REPORTING CO.,
Complainant,

vs.

BANKERS' FIRE INSURANCE COMPANY,
Defendant.

F. A. JONES,

Intervenor.

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

United States of America,
District of Arizona,—ss.

I, George W. Lewis, Clerk of the United States District Court for the District of Arizona, do hereby certify that the one hundred four (104) typewritten pages, numbered from one (1) to one hundred four (104), inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause as are necessary to the hearing of said cause, and as is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal from the judgment of said United States District Court for the District of Arizona, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the defendant for the preparation and certification of the typewritten transcript of record issued to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled [105] cause, to wit:

Clerk's fee (Sec. 828 R. S. U. S., as Amended by Sec. 6, Act of March 2, 1905), for making typewritten transcript of record, 255 folios, at 20¢ per folio.....	\$51.00
Certificate of Clerk to typewritten transcript of record, 3 folios, at 30¢ per folio.....	.90
Seal to said Certificate.....	.40
	<hr/>
	\$52.30

I hereby certify that the above cost for preparing and certifying record, amounting to \$52.30, has been paid to me by Messrs. Richard E. Sloan, Wm. M. Seabury and James Westervelt, attorneys for defendant.

I further certify that I hereto attach and herewith transmit the original Citation, issued in his cause.

IN WITNESS WHEREOF, I have hereto set my hand and affixed the Seal of said District Court at Phoenix, in said District, this 3d day of September, A. D. 1914.

[Seal]

GEORGE W. LEWIS,
Clerk.

By Robert E. L. Webb,
Deputy Clerk. [106]

*District Court of the United States, for the District
of Arizona.*

E.—15.

MERCHANTS & INSURERS' REPORTING
COMPANY,

Complainant,

vs.

BANKERS' FIRE INSURANCE COMPANY,
Defendant.

Citation [on Appeal (Original)].

President of the United States of America, to F. A.
Jones, Esq., and Lysander Cassidy, Esq., as Re-
ceiver for the Bankers' Fire Insurance Com-
pany:

You are hereby notified that in a certain case in equity in the United States District Court in and for the District of Arizona, wherein Merchants & Insurers' Reporting Company is complainant, and Bankers' Fire Insurance Company is defendant, and F. A. Jones is an intervenor, and wherein Lysander Cassidy, Esq., has been appointed by said court receiver of said Bankers' Fire Insurance Company by order dated July 1, 1914, an appeal has been duly allowed to Merchants & Insurers' Reporting Company and Bankers' Fire Insurance Company to the Circuit Court of Appeals in and for the 9th Judicial Circuit. You and each of you are hereby cited and admonished to be and appear in the said court at the City of San Francisco, State of California, within thirty days from the date of this citation, to show

cause, if any there be, why the order of April 8, 1914, overruling the demurrer to the amended petition of said F. A. Jones for leave to intervene herein and permitting said F. A. Jones to intervene herein, the order of April 25, 1914, overruling the demurrer of complainant and defendant to the petition in intervention herein of said F. A. Jones, and the order of July 1, 1914, appointing Lysander Cassidy, Esq., as receiver of the Bankers' Fire Insurance Company, each of which is appealed from herein, [107] should not be corrected and speedy justice done to the parties in that behalf.

WITNESS the Honorable WILLIAM H. SAWTELLE, Judge of the United States District Court in and for the District of Arizona, this 18th day of July, 1914.

WM. H. SAWTELLE,
Judge of the United States District Court for the
District of Arizona.

Service accepted Aug. 8, 1914.

GEORGE J. STONEMAN,
REESE M. LING,

Solicitors for F. A. Jones, Intervenor. [108]

[Endorsed]: E.—15. In the Dist. Ct. of the U. S. for District of Arizona. Merchants & Insurers' Rep. Co. vs. Bankers' Fire Ins. Co. Citation. Filed Jul. 18, 1914. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. [109]

[Endorsed]: No. 2477. United States Circuit Court of Appeals for the Ninth Circuit. Merchants & Insurers' Reporting Company, a Corporation, and Bankers' Fire Insurance Company, a Corporation, Appellants, vs. F. A. Jones, Intervenor, and Ly-sander Cassidy, as Receiver of the Bankers' Fire Insurance Company, a Corporation, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Arizona.

Received and filed September 5, 1914.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

United States
Circuit Court of Appeals

For the Ninth Circuit.

**THE TRINITY GOLD DREDGING AND
HYDRAULIC COMPANY, a Corporation,**

Appellant,

vs.

**ANGELE BEAUDRY, as Executrix of the Last
Will and Testament of FREDERIC BEAU-
DRY, Deceased, and ANGELE BEAUDRY,
Individually,**

Appellees.

Transcript of Record.

**Upon Appeal from the United States District Court
for the Northern District of California,
Second Division.**

Filed

SEP 21 1914

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals

For the Ninth Circuit.

THE TRINITY GOLD DREDGING AND
HYDRAULIC COMPANY, a Corporation,

Appellant,

vs.

ANGELE BEAUDRY, as Executrix of the Last
Will and Testament of FREDERIC BEAU-
DRY, Deceased, and ANGELE BEAUDRY,
Individually,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court
for the Northern District of California,
Second Division.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Admission of Service of Praeceptum for Transcript of Record	130
Assignment of Errors	118
Bond on Appeal	124
Citation on Appeal (Original)	132
Claim of Trinity Gold Dredging and Hydraulic Company	46
Clerk's Certificate to Record on Appeal	131
Decree	101

EXHIBITS:

Exhibit "A" to First Amended Bill of Complaint	46
Exhibit "A" to Claim of Trinity Gold Dredging and Hydraulic Company—Agreement July 21, 1906, Fred Beaudry and George H. Whitelaw....	67
Exhibit "B" to First Amended Bill of Complaint—Affidavit of Charles W. Willard	94
Exhibit "B" to Claim of Trinity Gold Dredging and Hydraulic Company—Agreement, August 8, 1907, Fred Beaudry and G. H. Whitelaw	74

Index.	Page
EXHIBITS—Continued:	
Exhibit "C" to Claim of Trinity Gold Dredging and Hydraulic Company— Escrow Agreement, Fred Beaudry and G. H. Whitelaw and Pioneer Trust Company of Kansas City.....	75
Exhibit "D" to Claim of Trinity Gold Dredging and Hydraulic Company— Letter, Dated January 15, 1909, Fred Beaudry and G. H. Whitelaw to Pioneer Trust Company	80
Exhibit "E" to Claim of Trinity Gold Dredging and Hydraulic Company— Agreement, Dated December 11, 1909, Fred Beaudry and G. H. Whitelaw...	84
Exhibit "F" to Claim of Trinity Gold Dredging and Hydraulic Company— Letter, Dated December 11, 1911, Fred Beaudry to G. H. Whitelaw.....	92
First Amended Bill of Complaint.....	1
Motion to Dismiss First Amended Bill of Com- plaint	97
Opinion, Oral, on Motion to Dismiss Amended Bill of Complaint	105
Order Allowing Appeal and Fixing Amount of Bond	122
Order Granting Motion to Dismiss Amended Bill of Complaint	100
Petition for Appeal	116
Praecipe for Transcript of Record.....	127
Proposed Bill of Exceptions of Complainant	

Index.

Page

from Order Granting Defendants' Motion to Dismiss First Amended Bill of Com- plaint	103
Refusal of George H. Whitelaw to Join in Appeal	115
Stipulation Consenting to the Use of Bill of Exceptions on Order Granting Defendants' Motion to Dismiss First Amended Bill of Complaint as and for a Bill of Exceptions upon Appeal from Judgment.....	110
Summons in Severance.....	113

*In the United States District Court, in and for the
Northern District of California.*

No. 20.

THE TRINITY GOLD DREDGING & HY-
DRAULIC COMPANY, a Corporation,
Complainant,

vs.

ANGELE BEAUDRY, as Executrix of the Last
Will and Testament of FREDERIC BEAU-
DRY, Deceased, ANGELE BEAUDRY, In-
dividually, and GEORGE H. WHITELAW,
Defendants.

First Amended Bill of Complaint.

To the Judges of the United States District Court,
in and for the Northern District of California:

After leave of Court first had and obtained in that
behalf, The Trinity Gold Dredging & Hydraulic
Company, a corporation organized and existing under
and by virtue of the laws of the State of Arizona,
and a citizen and resident of said State, brings this
its first amended bill of complaint against Angele
Beaudry, as executrix of the last will and testament
of Frederic Beaudry, deceased, of the City and
County of San Francisco, in said State of California,
and a citizen, resident and inhabitant of said State
and of the Northern District thereof, Angele Beau-
dry, individually, of the City and County of San
Francisco, in said State of California, [1*] and a
citizen, resident and inhabitant of said State and of
the Northern District thereof, and George H. White-

*Page-number appearing at foot of page of original certified Record.

law, of Los Angeles, in the County of Los Angeles, in said State of California, and a citizen, resident and inhabitant of said State, and complaining of the said defendants your orator complains and says:

I.

That the complainant, The Trinity Gold Dredging & Hydraulic Company, was organized as a corporation under the laws of the then Territory (now State) of Arizona on the 25th day of November, 1908, and ever since its said organization as such has been and now is a corporation duly organized under the laws of the said State (formerly Territory) of Arizona, with its principal office at Tucson, in said State, and having an office for the transaction of its corporate business at Minneapolis, in the State of Minnesota, and ever since the admission of the State of Arizona as a State has been and now is a citizen and resident of the said State of Arizona.

That Frederic Beaudry (who was the same person as the Fred Beaudry hereinafter mentioned, and who is herein designated as Fred Beaudry) was during all the times herein mentioned, up to the time of his death on or about the 16th day of December, 1911, a citizen, resident and inhabitant of the City and County of San Francisco, State of California, and of the Northern District of the said State of California; that the said Fred Beaudry died on or about the 16th day of December, 1911; that the said Fred Beaudry left a last will and testament wherein he named, designated and appointed the defendant, Angele Beaudry, as executrix thereof, and wherein [2] and whereby he gave to the said defendant,

Angele Beaudry, all his property of whatsoever kind; that after the death of the said Fred Beaudry, as aforesaid, and upon proceedings in that behalf duly had in the Superior Court of the State of California, in and for the City and County of San Francisco, the Court having jurisdiction thereof, and on or about the 10th day of January, 1912, the order of the said Court was duly given and made admitting the said last will and testament of the said Fred Beaudry, deceased, to probate, and ordering the issuance of letters testamentary thereon to the said defendant, Angele Beaudry; that thereupon and on or about the said 10th day of January, 1912, the said Angele Beaudry duly qualified as such executrix and letters testamentary were duly issued to her out of and under the seal of said Court as such executrix; that said letters never have been revoked or set aside and are now in full force and effect, and ever since the said 10th day of January, 1912, the said defendant, Angele Beaudry, has been and now is the duly appointed, qualified and acting executrix of the last will and testament of the said Fred Beaudry, deceased; that the said Angele Beaudry, as such executrix, and the said Angele Beaudry, individually, at all times herein mentioned has been and now is a citizen, resident and inhabitant of the State of California, and of the Northern District thereof, and of the City and County of San Francisco, in said State.

That the defendant, George H. Whitelaw, ever since about the 1st day of January, 1908, has been and now is a citizen, resident and inhabitant of the State of California, and of the City of Los Angeles,

County of Los Angeles, in said State. [3]

II.

That heretofore and on the 21st day of July, 1906, the said Fred Beaudry claiming to be the owner of certain lands and properties situated in Trinity County, in said State of California, including the lands and properties hereinafter mentioned, and desiring to find a purchaser for the same and for the purpose of procuring the sale thereof to such purchaser, did procure the said defendant, Whitelaw, who was then residing at Delta, in the State of Colorado, to act as agent for the said Fred Beaudry for the purpose of negotiating a sale of the said properties, and for the purpose and as a means of procuring such purchaser through such agency, and with the intention and purpose that the contract of sale hereinafter referred to from said Fred Beaudry to said Whitelaw should be assigned to such purchaser so obtained by said Whitelaw for said Fred Beaudry, the said Fred Beaudry did on the 21st day of July, 1906, enter into a contract of sale by the terms of which said Fred Beaudry, as first party therein, did agree to sell to the said defendant, Whitelaw, and to his assigns who should succeed to the interests of said Whitelaw, as second party and vendee in said contract, certain lands and properties situated in Trinity County, in said State of California, hereinafter described, and did agree to convey the same to said Whitelaw, or his assigns, as aforesaid, upon the payment of the purchase price in the said contract fixed, by good and sufficient deed, free from all encumbrances.

That the said lands and properties, the subject of the said contract, were and are located in Township 35 North, Range 8 West, Mount Diablo Base and Meridian, in Trinity [4] County, California, and are described as follows, to wit:

Certain gravel mines, together with the timber, the improvements thereon and fixtures and personal property belonging to and used in connection therewith, including pipes, flumes, ditches, sawmills, block-mill, giants, tools, buildings, furniture and the first right to six thousand (6,000) inches of water from the East Fork of Stewart's Fork of the Trinity River, and water rights from Strobe Creek, including those certain mining claims and properties known as:

Minersville No. 1, 160 acres more or less, patented.

Minersville No. 2, 160 acres more or less, patented.

Minersville No. 3, 160 acres more or less, patented.

Red Gulch, 140 acres more or less, patented.

Ridge, 160 acres more or less, patented.

Gassy Hill, 160 acres more or less, patented.

Head of Digger Creek, 160 acres more or less, patented.

Diener, 160 acres more or less, patented.

Diener No. 2, 160 acres more or less, unpatented.

Mule Creek Ridge, 160 acres more or less, unpatented.

Long Gulch, 120 acres more or less, unpatented.

Connection, 40 acres more or less, unpatented.

Sweet Gulch, 160 acres more or less, unpatented.

Little Mule No. 2, 160 acres more or less, unpatented.

Strope Creek, 160 acres more or less, unpatented.

Little Mule, 160 acres more or less, unpatented.

Greenhorn Flat, 160 acres more or less, Receiver's Receipt.

Greenhorn Flat No. 2, 160 acres more or less, Receiver's Receipt.

Greenhorn Gulch, 140 acres more or less, Receiver's Receipt.

Taylor Gulch, 160 acres more or less, Receiver's Receipt.

Lane Gulch, 160 acres more or less, Receiver's Receipt.

That as to the said mining claims opposite which, as hereinbefore set forth, the word "patented" occurs, the said Fred Beaudry represented that the said mining claims had been patented and that he was the sole owner in fee thereof; that as to the said mining claims opposite which, as hereinbefore set forth, the word "unpatented" occurs, the said Fred Beaudry represented that he was the sole owner thereof as valid mining claims held by valid mining locations under the laws of the United States validly made; that as to the said mining claims opposite which, as hereinbefore set forth, the words [5] "Receiver's Receipt" occurs, the said Fred Beaudry represented that he was the sole owner of the said claims as valid mining claims held by valid mining locations under the laws of the United States validly made, and that Receiver's Receipts had been duly issued to him by the United States Government as

such owner under valid applications for patent therefor from the United States Government, in pursuance of which said applications full consideration therefor had been paid to the United States Government; and in and by the said contract the said Fred Beaudry represented the validity of the patents thereon as to all those mining claims upon which patents had been issued, as hereinbefore set forth, and the validity of the locations and mining claims thereon as to those claims which were unpatented, and the validity of the mining claims and locations and Receiver's Receipts thereon as to those tracts upon which Receiver's Receipts had been issued, as hereinbefore set forth, and in and by the said contract the said Fred Beaudry agreed that, upon the payment of the consideration provided for by the said contract, he would convey good and valid title, as aforesaid, to all of the said properties and mining claims, with the timber thereon, free of all liens and encumbrances.

That the purchase price of the said property fixed in the said contract was the sum of \$250,000, the same to be payable in instalments, with interest, at various times stated in said contract; that the date fixed in the said contract for the payment of the first instalment of the said purchase price was the 10th day of August, 1907, and the time was so fixed more than one year after the date of the said contract in order that the said Whitelaw, as such agent and [6] representative of said Fred Beaudry, would have the intervening period of time to procure a purchaser for the said property as assignee of the said White-

law under said contract.

That in and by the said contract it was further provided that the second party thereto should make necessary improvements and repairs on the said property so as to put certain of the mining claims thereon in complete readiness for exploitation; also that on certain other property the purchaser should place a working hydraulic plant, build a new flume, enlarge the ditch for the purpose of carrying water to the said properties, build a wagon road to certain of the said properties, and put up a telephone along the line of the water ditch supplying the said properties with water and connect it with the main through telephone line, and that the purchaser should spend not less than \$10,000 in making such improvements.

That in and by the said contract it was further provided that the purchaser should have the right to use all of said properties, except a certain portion thereof reserved until the sum of \$62,500 had been paid on account of the purchase price, for the purpose of prospecting, developing and working the said mines, the said purchaser to have complete possession of all of said property as soon as \$62,500 had been paid on account of the purchase price.

III.

That the said Whitelaw, upon the execution of the said contract, went into possession of the said property, but all his acts in the premises were as agent of the said Fred Beaudry, as hereinbefore set forth, and the said Whitelaw did not [7] himself pay any portion of the purchase price of the said property, either at that time or at any other time, or make

any expenditures on the improvements on the said properties, as provided for by the said contract, but at all times both then and thereafter in connection with the said property acted and has acted and now acts as agent and representative of the said Fred Beaudry, and of the estate of said Fred Beaudry, deceased, and of the defendant, Angele Beaudry, as executrix, as aforesaid, and as sole devisee and legatee of said Fred Beaudry, in the making of the said contract and in the procuring of a purchaser through said contract of said lands and premises.

IV.

That in pursuance of the said agency and on or about the 20th day of August, 1907, and before any part of the purchase price under said contract had been paid, said Whitelaw, with the assistance of one William D. Beam, procured by said Whitelaw to assist him in the premises, said Beam acting for said Whitelaw and said Fred Beaudry, did procure one V. A. Whipple, of Minneapolis, in the State of Minnesota, to enter into an agreement between said Whipple, said Whitelaw and said Beam, and the said Whitelaw, Beam and Whipple did then and thereupon enter into an agreement under and by the terms of which said Whitelaw transferred, assigned and set over to himself, said Beam and said Whipple all the rights and interests of said Whitelaw in the contract hereinbefore referred to with the said Beaudry, dated July 21, 1906, and all the right, title and interest of said Whitelaw under said contract in the said properties, the subject thereof. That in and by the said agreement between said Whitelaw, Beam

and Whipple it was provided [8] that the said Whitelaw, Beam and Whipple should cause to be organized a mining company or companies which should become the purchaser or purchasers, and assignee or assignees, of all of the rights originally vested in the said Whitelaw under the said contract of July 21, 1906, and in and to the properties the subject of the said contract, and that the said mining company or companies should become the purchasers under said contract of July 21, 1906, of the lands and properties therein named as assignees of said Whitelaw, and that the said mining company or companies should pay or cause to be paid the purchase price stipulated in said contract of July 21, 1906, and should perform all of the terms, conditions and covenants of the said contract of July 21, 1906, on the part of the said Whitelaw to be performed.

That thereafter, and in accordance with the said agreement between the said Whitelaw, Beam and Whipple, the said Whitelaw, Beam and Whipple did cause to be organized three certain mining companies known, respectively, as The Trinity Gold & Timber Company, Trinity Gold Milling Company, and the complainant herein, The Trinity Gold Dredging & Hydraulic Company. That all of the said companies were organized as corporations under the laws of the territory (now State) of Arizona, the said The Trinity Gold & Timber Company having been so organized on or about the 23d day of May, 1908; the said Trinity Gold Milling Company having been so organized on or about the 20th day of May, 1908; and this complainant, The Trinity Gold Dredg-

ing & Hydraulic Company, having been so organized on or about the 25th day of November, 1908. [9]

That the said corporations were so organized by the said Whitelaw, Beam and Whipple solely for the purpose of becoming purchasers of said lands and properties the subject of the said agreement of July 21, 1906, through an assignment of all of the rights of the said Whitelaw as second party thereto and purchaser thereunder, and in accordance with the said purpose and plan, the said Whitelaw, Beam and Whipple did thereupon assign, transfer and set over to the said three last-named corporations the said contract of July 21, 1906, and all their rights of any kind thereunder, and all their rights of any kind in and to the lands and properties the subject of the said contract; that thereafter, and on or about the 1st day of December, 1909, the said The Trinity Gold & Timber Company and the said Trinity Gold Milling Company did transfer, assign and set over unto this complainant, The Trinity Gold Dredging & Hydraulic Company, the contract of July 21, 1906, and all the rights of the said corporations, or either of them, under the said contract and in and to the properties the subject thereof, and the said complainant, The Trinity Gold Dredging & Hydraulic Company, did on or about the 1st day of December, 1909, become through assignments from said Whitelaw, Beam and Whipple, said The Trinity Gold & Timber Company and said Trinity Gold Milling Company the sole assignee and owner of the said contract of July 21, 1906, and of all of the rights of the said Whitelaw, as second party and purchaser under said

contract, and in and to the lands and properties the subject of the said contract, and of all of the rights of the said prior assignees and holders under the said contract, and in and to the said lands [10] and properties, to wit, of the said Whitelaw, Beam and Whipple, the said The Trinity Gold & Timber Company and the said Trinity Gold Milling Company, and that the said complainant ever since has been and now is such owner and assignee of said rights as purchaser and second party under said contract of July 21, 1906.

V.

That subsequent to the execution of said original contract of July 21, 1906, and prior to the 1st day of March, 1912, the terms of said contract with respect to the times of payment of the various instalments of said purchase price were modified and changed by express contract between said Fred Beaudry and the person or persons vested at the time of such change with the rights of the said Whitelaw as second party thereto and purchaser thereunder; that the terms of the said contract were between the said dates similarly changed by imposing other obligations on the purchaser thereunder for the payment of other expenses in connection with the said contract and the said properties than as provided in the said original contract.

VI.

That up to the time of the rescission of said contract by this complainant, as hereinafter stated, this complainant and its predecessors in interest in the said contract, [11] as hereinbefore set forth, have

at all times duly and punctually performed all the obligations, terms, conditions and covenants of the said contract, as so modified, on their part to be performed and have made all the payments provided by the said contract, as so modified, to be made up to the time of such rescission.

That the complainant herein and its predecessors in interest under the said contract, as hereinbefore set forth, have paid to the said Fred Beaudry and his estate, as principal of the purchase price provided by the said contract, the sum of \$200,000, and as interest on deferred payments and as consideration for deferring the said payments on account of the said purchase price by the modifications of the said original contract, as hereinbefore set forth, the further sum of \$20,950, of which said sums the amount of \$31,969.95, principal and interest, was paid by this complainant during the months of January and February, 1912, and after the death of said Fred Beaudry, as aforesaid; that this complainant and its predecessors in interest have further paid and expended upon the improvements provided to be constructed on the said property under the said contract, as hereinbefore set forth, and for other expenses in connection therewith, as provided by the said contract and the various modifications thereof, hereinbefore referred to, a sum not less than \$83,219; that all said payments aggregating the sum of not less than \$304,169 were so made prior to the first day of March, 1912; that complainant and its predecessors in interest have further expended in the care and management of said properties, and in the operation of

said mining claims, while in possession of said properties, [12] and prior to the 1st day of December, 1911, further large sums which at all times have been and are largely in excess of any and all receipts from said operation. That the gross receipts from the operation of said properties during the entire time when complainant and its predecessors in interest were in possession thereof, as aforesaid, did not exceed the sum of \$35,000.00; that complainant did not prospect or mine upon or operate in any manner said properties after the 13th day of September, 1912, nor was any gold or anything else of value taken from said properties by complainant subsequent to said 13th day of September, 1912.

VII.

That complainant and its predecessors in interest as purchasers under said contract of July 21, 1906, were ever since the payment of \$62,500 on account of the purchase price of the said properties, and up to and beyond the time of the commencement of this action, in the possession and occupation of the property and premises, the subject of the said contract.

VIII.

That prior to the 21st day of July, 1906, the said Beaudry applied to the Register of the United States Land Office at Redding, in the State of California, for a mineral patent for the mining claim hereinabove referred [13] to and designated as the Long Gulch placer claim; that on said 21st day of July, 1906, final action had not been taken by said Register or said land office upon said application of said Beaudry, but said application was pending in

said land office; that neither upon said date, nor at any time thereafter prior to the 10th day of September, 1908, were any adverse claims or contests to said application of said Beaudry to said Long Gulch placer claim pending in said land office, or elsewhere; that on or about the 10th day of September, 1908, certain proceedings adverse to said application of said Beaudry were instituted by the United States Government, at the instance of the Forest Reserve Commissioner of said Government; that in and by said last mentioned proceedings, it was asserted [14] and charged by said Government that the land included in said Long Gulch placer claim was of no value for mineral purposes, because the same had become exhausted of all mineral deposits, and that the title to said land was sought by said Beaudry not for mineral deposits but because of valuable timber thereon contained; that during the month of September, 1908, the predecessors in interest of this complainant for the first time became aware of the existence of said adverse proceedings by the United States Government, but that the said Beaudry thereupon and repeatedly thereafter assured the predecessors in interest of complainant and complainant that the claims of the United States Government in that regard were wholly without foundation, that said proceedings were wholly baseless, and that the certain result of said Beaudry's application for a patent to said Long Gulch placer claim would be that such patent would issue to said Beaudry notwithstanding said adverse proceedings on the part of said United

States Government; that thereafter and on or about the 12th day of May, 1909, the application of said Beaudry for a patent to said Long Gulch placer claim and the adverse proceedings instituted by the United States Government came on for hearing before the Register and Receiver of the United States Land Office at Redding; that upon said hearing, questions of fact and law arose and were contested by said Beaudry and by said United States Government, respectively; that said proceedings were duly submitted to said land office, and thereafter and on or about the 25th day of May, 1910, the said Register and said Receiver of said land office at Redding gave and made their decision in the premises; that in and by said last mentioned decision, it was [15] decided that the contentions of the United States Government with respect to said Long Gulch placer claim, which are hereinabove set forth, were not well founded, but it was further adjudged by said Register and said Receiver that said Beaudry had failed to establish the mineral character of the land included in said Long Gulch placer claim, and said Register and said Receiver recommended that said Beaudry be allowed a reasonable time to make a further showing as to the mineral character of said land, and that, upon his failure to make such showing, said mineral claim should be held for cancellation; that thereafter the decision of said land office at Redding was reviewed by the General Land Office of the United States Government at Washington, District of Columbia, and thereafter, and, to wit, on or about the 17th day of April, 1911, the Commissioner of the

General Land Office at Washington duly gave and made his decision reviewing the action of said Register and said Receiver hereinabove referred to and modifying the same, and directing that the said entry of said Beaudry be held for cancellation upon the ground that said Beaudry had failed to establish the mineral character of the land included in said Long Gulch placer claim; that at the times hereinbefore mentioned, the said Beaudry repeatedly represented to this complainant and its predecessors in interest that notwithstanding the action of said Register and Receiver, and notwithstanding the action of said Commissioner, patent would eventually issue to him from the United States Government to said Long Gulch placer claim, and that the said Beaudry intended to and would appeal from the decision of said Commissioner to the Secretary of the Interior and obtain a reversal of the decision of said Commissioner; that [16] thereafter the said Beaudry did appeal from the decision of said Commissioner to the Department of the Interior, and thereafter and on or about the 23d day of May, 1912, the order of said Commissioner was affirmed by the Assistant Secretary of the Department of the Interior of the United States; that thereafter the defendant, Angele Beaudry, as executrix of said Beaudry's will, petitioned the said Department for a rehearing of its decision affirming the action of said Commissioner, and said petition for rehearing was pending up to and including the 13th day of September, 1912; that on said last mentioned date, said petition for rehearing was denied by said Department of the Interior; that at

all of the times prior to the denial of said petition for rehearing by the Department of the Interior, this complainant was assured by said Beaudry, and after the death of said Beaudry by the said Angele Beaudry, as his executrix, that grounds existed for the reversal of the action of the Commissioner of the United States Land Office holding said Fred Beaudry's entry to said Long Gulch placer claim for cancellation, and that a patent to said mining claim would eventually issue to said Beaudry or to his executrix; that prior to the institution of the proceedings brought by the United States Government to cancel the entry of said Beaudry to said Long Gulch placer claim, this complainant and its predecessors in interest had paid a large portion of the consideration by it to be paid under the terms of said contract of July 21, 1906, and the modifications thereof; that by reason of said payments and by reason of having undertaken the performance of said contract, and having become heavily involved in the performance thereof, the predecessors in interest of this complainant could not on said 12th day of September, 1908, or at [17] any time thereafter, nor could this complainant at any time subsequent thereto, seek a rescission of said contract without involving themselves or itself in litigation and probable loss; that said last mentioned facts were well known to said Fred Beaudry, and to the defendant, Angele Beaudry, as the executrix of his will, and said Fred Beaudry, and the said Angele Beaudry, executrix as aforesaid, well knowing the reluctance of this complainant and its predecessors in interest

to call for a rescission of said contract owing to such facts, represented to the predecessors in interest of said complainant and to this complainant repeatedly after the 12th day of September, 1908, and during the pendency of said contest of the United States Government over the validity of said mining entry, that patent would in the end certainly issue to the said Beaudry or to his executrix; that said representations were made for the purpose of inducing the predecessors in interest of this complainant and this complainant to continue in the performance of said contract, and for the purpose of persuading the predecessors in interest of this complainant and this complainant from calling for a rescission of said contract, and for the purpose of persuading and inducing this complainant and its predecessors in interest to make further payments to said Fred Beaudry pursuant to the terms of said contract; that pursuant to the terms of said contract, as construed by the laws of the State of California, the said Fred Beaudry was not required to have or obtain a valid title to said Long Gulch placer mining claim, or to any of the claims in said contract described, at any time prior to the time when, by the terms of said contract, the said Fred Beaudry was to execute and deliver to this complainant a conveyance of said [18] Long Gulch placer mining claim and said other mining claims in said contract referred to; that the time last hereinabove referred to, to wit, the time when, under the terms of said contract, said Beaudry would be required to convey said mining claims, and particularly said Long Gulch placer min-

ing claim, to this complainant, was the date upon which the final payment by this complainant to said Beaudry was to be made pursuant to the said contract and the extensions thereof hereinabove referred to, and was, to wit, the 1st day of January, 1913; that under and by virtue of the terms of said contract and the extensions thereof hereinabove referred to, this complainant was not legally in a position, nor were its predecessors in interest ever in a position, to rescind said contract, and could not have rescinded said contract, because of the proceedings taken by said United States Government to cancel the entry of said Fred Beaudry to said Long Gulch placer mining claim at any time prior to the 1st day of January, 1913, unless, prior to that time, it became reasonably certain not only that said Beaudry's title to said Long Gulch placer mining claim had failed, but also that said Beaudry could not by any ordinary means obtain title to said Long Gulch placer mining claim by or before or on said 1st day of January, 1913; that so long as it remained within the realm of reasonable possibility for said Beaudry or the executrix of his will to complete his title to said Long Gulch placer mining claim either by obtaining a reversal of the decision of said Local Land Office at Redding, or by obtaining a reversal of the decision of the said General Land Office at Washington affirming the decision of said local land office, or by obtaining a rehearing of the decision of the Department of the Interior affirming [19] the decision of said General Land Office, this complainant and its said predecessors in interest were

unable to know with reasonable certainty that said Beaudry, or the executrix of his will, would not on said 1st day of January, 1913, be in a position to convey good and valid title to said Long Gulch placer mining claim to this complainant, and, therefore, this complainant was at all times prior to the 13th day of September, 1912, and prior to the 1st day of October, 1912, when this complainant learned for the first time of the decision of said Department of the Interior denying the petition of said Fred Beaudry for a rehearing, unable to rescind its said contract with said Beaudry upon the ground of the failure of title in said Beaudry to said Long Gulch placer mining claim; that on or about the 1st day of October, 1912, and by reason of the foregoing, this complainant for the first time became entitled to rescind said contract upon the ground of failure of title in said Beaudry to said Long Gulch placer mining claim; that if at any time prior to the said 13th day of September, 1912, or the 1st day of October, 1912, this complainant became entitled to rescind its said contract with said Beaudry by reason of the failure of title in said Beaudry to said Long Gulch placer mining claim, this complainant was induced to believe that said right did not exist by said Fred Beaudry, and by the defendant herein, Angele Beaudry as the executrix of his will, by the representations of said Fred Beaudry and said executrix hereinabove referred to; that during the pendency of said contest between said Beaudry and said United States Government over the right of said Beaudry to said Long Gulch placer mining

claim, said Beaudry, and said defendant, Angele Beaudry as his executrix, repeatedly affirmed and declared [20] to this complainant and its predecessors in interest that said Beaudry's title to said claim was perfect, and that patent would eventually issue to said Beaudry or to his said executrix, and that said lands were unquestionably as a matter of fact, as well as in law, mineral lands, and that said Beaudry had had said lands examined by mining experts, and had had tests made of said lands, which established conclusively that said lands were mineral lands; that by reason of said representations, the predecessors in interest of this complainant and complainant at all times prior to the 1st day of October, 1912, firmly believed that the lands included in said Long Gulch placer mining claim were mineral lands, and that patent would issue therefor to said Beaudry or to his said executrix, and this complainant and its said predecessors believed and were led to believe by said Beaudry and by his said executrix that in any event it would be most dangerous to complainant, in view of the large amounts of money which it had invested and paid out to said Fred Beaudry upon its contract with said Beaudry, and in view of the grave doubt as to whether the claims of said United States Government would ever be substantiated and established, to attempt to call for a rescission of said contract upon the ground of failure of title in said Fred Beaudry to said Long Gulch placer mining claim.

That prior to the 1st day of October, 1912, this complainant and its predecessors in interest had paid

in excess of \$300,000 upon its contract with said Beaudry in direct cash payments to said Beaudry and in moneys expended under said contract in the development of said mining claims; that on said date there remained due to be paid to the said Angele [21] Beaudry, as executrix as aforesaid, by this complainant under said contract only the final payment, to wit, the sum of \$50,000, and no more; that by reason of having paid out and expended such large amounts of money upon the performance of said contract, and in the development of said mining claims, this complainant was reluctant to call for a rescission of its said contract with said Fred Beaudry, and delayed for a period of three months after the discovery that title had completely failed in said Fred Beaudry to said Long Gulch placer mining claim, as aforesaid, and that the defendant, Angele Beaudry, as his executrix, would not be able to convey a valid title to said mining claim to complainant on the 1st day of January, 1913, to call for such rescission; that during the period between the 1st day of October, 1912, when this complainant first learned of the complete failure of title to said Long Gulch placer mining claim in said Fred Beaudry, and of the inability of said Angele Beaudry, as such executrix, to fulfill the obligations of said contract, as aforesaid, and the 31st day of December, 1912, when this complainant called for a rescission of its said contract with said Beaudry, as herein set forth, this complainant endeavored in every way by negotiations with said defendant, Angele Beaudry, and otherwise, to discover some means of enabling said

Angele Beaudry, as such executrix, to complete her title to the said Long Gulch placer mining claim, and to all of the claims referred to in said contract, and endeavored to obtain from the defendant herein, Angele Beaudry, the executrix of said Beaudry's will, a further extension of the time for payment of said sum of \$50,000, and offered to said defendant, Angele Beaudry, executrix as aforesaid, to extend the time when [22] said executrix should be called upon under said contract and the extensions thereof to convey said claims to this complainant, in order that said defendant, Angele Beaudry, executrix as aforesaid, might, in the meantime, take such action as would enable her to fulfill the terms of said contract and the modifications thereof, and to convey to this complainant, as called for by said contract and the extensions thereof, valid title to said mining claims, and all of them, and particularly to said Long Gulch placer mining claim; that notwithstanding such efforts upon the part of this complainant, said defendant, Angele Beaudry, as executrix as aforesaid, refused to extend the time of said payment, and refused to assent to an extension of the time for the completion of said contract, and prior to the 31st day of December, 1912, served a notice upon this complainant that, unless said sum of \$50,000 were punctually paid on the 1st day of January, 1913, the said defendant, as such executrix as aforesaid, would avail herself immediately of the default of this complainant in making said payment and would terminate, or attempt to terminate, the contract between the said Fred Beaudry and this

complainant, and the extensions thereof, and would demand a forfeiture, or would attempt to demand a forfeiture of all the moneys which this complainant had theretofore paid under said contract and the extensions thereof.

That on the 1st day of October, 1912, complainant first received knowledge of the denial of the petition for a hearing by said Department of the Interior at the City of Minneapolis, in the State of Minnesota; that at said time all of the officers of complainant were in and resided in [23] said City of Minneapolis; that in order to ascertain whether any reasonable means existed of overcoming the defect in the title of the estate of said Beaudry to said Long Gulch placer mining claim caused by the adverse decision of said Department, it became necessary for one of complainant's officers to go from said City of Minneapolis to the State of California; that complainant did cause one of its officers to go to the State of California for such a purpose and for the further purpose of negotiating with said defendant, Angele Beaudry, as executrix, with a view to enabling said defendant, as such executrix, to take any steps or proceeding that might enable said defendant, as such executrix, to convey to complainant a valid title to said mining claim as required by its contract with said Fred Beaudry, and if such a result could not be accomplished on or before the 1st day of January, 1913, with a view to extending the time for the final payment under said contract and for the conveyance by said defendant as such executrix to this complainant of a valid title to said Long Gulch placer mining

claim as called for by said contract; that the delay of three months by this complainant in rescinding its contract, as aforesaid, was still further occasioned by the foregoing.

That prior to the 21st day of July, 1906, the said Beaudry applied to the Register of the United States Land Office at Redding for a mineral patent to the claim hereinabove referred to and designated as the Mule Creek Ridge placer mining claim; that on said 21st day of July, 1906, final action had not been taken by said Register of said land office on said application, but said application was [24] pending in said land office; that no adverse claims or contests to said application of said Beaudry were on said date or at any time thereafter prior to the 13th day of August, 1908, pending in said land office or elsewhere; that on or about the 13th day of August, 1908, a contest similar in all respects to the contest which the United States Government prosecuted against the application of said Beaudry to said Long Gulch placer mining claim was lodged in said land office at Redding by the United States Government; that thereafter proceedings similar in all material respects, and occurring on practically the same dates, as those hereinabove described relating to said Long Gulch placer mining claim were had with respect to the application of said Fred Beaudry for patent to said Mule Creek Ridge placer mining claim; that it was not until the 13th day of September, 1912, that the Department of the Interior took final action holding the entry of said Fred Beaudry to said Mule Creek Ridge placer mining claim for cancellation,

and denying the application of the defendant herein, Angele Beaudry, as executrix, for a rehearing on its former decision, and it was not until the 1st day of October, 1912, that this complainant first learned of such final action on the part of said Department, and that title to said Mule Creek Ridge placer mining claim had completely and irreparably failed in said Fred Beaudry, and that the defendant, Angele Beaudry, as executrix, would not be able to complete or carry out the contract of said Fred Beaudry with complainant as aforesaid; that the right of this complainant to rescind upon the ground of failure of title in said Fred Beaudry to said Mule Creek Ridge placer mining [25] claim did not accrue until on or about the 1st day of October, 1912; that for similar reasons to those hereinbefore set forth in respect to the said Long Gulch placer mining claim, this complainant did not rescind its contract with said Fred Beaudry upon the ground of failure of title in said Fred Beaudry to said Mule Creek Ridge placer mining claim until the 31st day of December, 1912.

That prior to the 21st day of July, 1906, the said Fred Beaudry applied to the Register of the United States Land Office at Redding for a mineral patent to the mining claims hereinabove referred to under the heading of Receiver's Receipt, to wit, to the mining claims known as Greenhorn Flat, Greenhorn Flat No. 2, Greenhorn Gulch, Taylor Gulch and Lane Gulch, said claims being hereinafter referred to as the Greenhorn Group of placer mining claims; that on the 21st day of July, 1906, final action had not been taken by said Register or said land office on

said applications of said Fred Beaudry, but said applications were pending in said land office; that there were no adverse claims or contests to said applications of said Fred Beaudry pending in said land office or elsewhere on said last mentioned date and at no time thereafter prior to the 8th day of October, 1908; that on or about the 8th day of October, 1908, contests to said applications of said Fred Beaudry were filed in said land office by the United States Government, at the instance of the United States Forest Reserve, alleging numerous grounds and reasons why patent should not issue to said Fred Beaudry to said Greenhorn [26] Group of placer mining claims, and why the entry of said Fred Beaudry to said claims should be held for cancellation; that said grounds were in the main similar to the charges instituted by said United States Government with respect to the entries of said Fred Beaudry upon said Long Gulch placer mining claim and said Mule Creek Ridge placer mining claim; that thereafter the hearing of the applications of said Fred Beaudry and the contests of said United States Government thereto came on before said land office at Redding, and questions of fact and law arose and were contested upon said hearing; that pending said hearing and on or about the 14th day of December, 1909, said Fred Beaudry made application to said land office at Redding for permission to withdraw the applications of said Fred Beaudry on file in said office, and with leave to said Fred Beaudry to renew such applications; that thereupon proceedings were halted in said land office at Redding, and the Register and Receiver

of said land office at Redding certified the question of the right of said Beaudry to such a withdrawal to the General Land Office at Washington; that such proceeding was pending in said General Land Office until the 9th day of March, 1912, when said General Land Office gave and made its order denying such leave to the representatives of said Fred Beaudry, and directing the said land office at Redding to proceed with the trial of the issues made between said Fred Beaudry and the United States Government on the applications of said Fred Beaudry and the contest of the United States Government thereto; that thereupon the said Angele Beaudry, as the executrix of the will of said Fred Beaudry, deceased, appealed to [27] the Department of the Interior from the said last mentioned order of said General Land Office; that said last mentioned appeal was still pending and undetermined before the Department of the Interior of the United States on the 31st day of December, 1912, and the said appeal is still pending and undetermined before said Department.

That similar representations were made by said Beaudry, and the defendant, Angele Beaudry, as executrix as aforesaid, to the predecessors in interest of this complainant and to this complainant respecting their rights to said Greenhorn Group of placer mining claims as against the United States Government as were made by them with respect to his right as against the United States Government to said Long Gulch placer mining claim and to said Mule Creek Ridge placer mining claim, as hereinabove set forth; that practically the same reasons existed with

respect to said Greenhorn Group of placer mining claims which made it impossible for this complainant to rescind its said contract with said Fred Beaudry prior to the 1st day of October, 1912, as existed with respect to said Long Gulch placer mining claim and said Mule Creek Ridge placer mining claim; that this complainant did not attempt to rescind its contract with said Fred Beaudry upon the ground of failure of title in said Beaudry in and to said Greenhorn Group of placer mining claims, and upon the ground that said Beaudry could not by any possible means obtain or procure title to said mining claims and convey the same to this complainant on the 1st day of January, 1913, for similar reasons as those set forth hereinabove with respect to said Long Gulch placer mining claim and said Mule Creek Ridge placer mining claim. [28]

IX.

That under the said contract of July 21, 1906, as so modified as hereinbefore set forth, the last installment of the purchase price therein provided for was provided to be paid on the 1st day of January, 1913; that on or about the 1st day of December, 1912, said defendant, Angele Beaudry, individually, and as executrix, as aforesaid, caused to be served upon this complainant a notice that, unless said balance was paid on the 1st day of January, 1913, she would terminate said contract of sale and would retake and retain all possession, right, title and interest in and to the said properties, and would oust this complainant from the possession thereof, without accounting to this complainant or paying to it any of the con-

siderations or payments so made by complainant and its predecessors in interest under said contract.

X.

That the value of all the property the subject of the said contract of July 21, 1906, has at all times consisted, and by the parties to this action has at all times been known to consist, chiefly in their value as placer mining properties and for the timber situated thereon; that the said properties, including said Mule Creek Ridge, Long Gulch, Greenhorn Flat, Greenhorn Flat #2, Greenhorn Gulch, Taylor Gulch, and Lane Gulch mining claims, constitute a contiguous body of land and form one entire property, every part of which is a material and substantial portion of the whole, and so known by all parties to constitute such material and substantial portion; that a failure of title to any portion of the said property, and [29] particularly a failure of title to the said mining claims known as the Mule Creek Ridge and Long Gulch mining claims, materially and substantially breaks the continuity of the said tract of land and impairs in a very substantial and considerable degree the value of the said properties.

That a failure of title to the said Mule Creek Ridge and Long Gulch mining claims breaks entirely the continuity of the said tract of land and divides the same into two distinct and separate parcels, and adds very considerable difficulty in the working and operation of the said property as mining claims and in the cutting and removal of the timber therefrom.

That the value of the said properties, the subject

of the said contract, omitting therefrom the said mining claims known as Mule Creek Ridge, Long Gulch, Greenhorn Flat, Greenhorn Flat #2, Greenhorn Gulch, Taylor Gulch and Lane Gulch, has been at all times since the 21st day of July, 1906, and is now less than the value of the said property, including the said mining claims, by a sum in excess of the sum of \$60,000, and the impairment in value of the entire tract of land, the subject of the said contract of July 21, 1906, by the exclusion therefrom of the said mining claims has at all times been and is now in excess of the amounts still remaining unpaid of the purchase price of the said properties as fixed in the said contract, as so modified, and the damage suffered by this complainant by the failure of the title to the said mining claims has been and is in excess of the amount of the said purchase price so still remaining unpaid.

That the total acreage of the properties covered by [30] said contract was and is 3,160 acres; that the total acreage of the said Mule Creek Ridge and Long Gulch mining claims was and is 280 acres; that the total acreage of the said Greenhorn Flat, Greenhorn Flat #2, Greenhorn Gulch, Taylor Gulch and Lane Gulch mining claims was and is 780 acres.

XI.

That by reason of the inability of the defendant, Angele Beaudry, individually, or as executrix, as aforesaid, and by reason of the inability of the estate of said Fred Beaudry, deceased, as hereinbefore set forth, to comply with the provisions of the said agreement of July 21, 1906, on their part to be per-

formed, and by reason of the failure of the consideration for the said contract, as hereinbefore set forth, and promptly upon the discovery of such failure of consideration, and in due time and before the time for making final payment of the purchase price of the said properties as provided in the said contract of July 21, 1906, and its various modifications, as hereinbefore set forth, and on or about the 31st day of December, 1912, this complainant rescinded the said contract and caused to be served upon said defendant, Angele Beaudry, as executrix of the last will and testament of said Frederic Beaudry, deceased, and as sole devisee under the said last will and testament of said deceased, and upon the said George H. Whitelaw a notice of rescission wherein and whereby this complainant notified said defendants that it did rescind the said contract of July 21, 1906, because of such failure of consideration, and because the said Fred Beaudry had not been [31] in his lifetime, and the said executrix was not and would not be, able to convey the properties mentioned in said contract and upon the consideration for which the said payments had been made by the complainant, as aforesaid; that this complainant did then and there offer to restore to said Angele Beaudry, as such sole devisee, and as such executrix, everything of value which it had received under the said contract, upon condition that the said defendant, Angele Beaudry, as devisee and executrix, as aforesaid, did likewise; that this complainant then and there offered to restore to said Angele Beaudry as such executrix and devisee, as aforesaid, all the property which had come into the possession of this

complainant under the said contract and to restore and reconvey all rights received by this complainant thereunder on the condition that the said defendant repay to this complainant all sums paid by this complainant and its predecessors in interest under the said contract as and for the purchase price therein provided for, and for improvements on the said property made in pursuance of the provisions of the said contract; that the said amounts so to be repaid were stated and fixed in said offer at the sum of \$200,000, provided the said offer were accepted on or before the 6th day of January, 1913; that in and by said notice of rescission the complainant stated further that in case such offer were not so accepted on or before the said date, the complainant reserved the right to require as a condition for the restoration of the said property by complainant the payment to it of such further sums, in addition to the said sum of \$200,000, as the complainant might be entitled to. [32]

That the said defendant did not, as such executrix, or otherwise, on or before the said 6th day of January, 1913, accept, nor has she as such executrix, or otherwise, or at all, accepted, the said offer of this complainant, or repaid to this complainant the said sums of money, or any part or portion thereof.

That complainant hereby offers to restore to the said defendant, Angele Beaudry, as executrix, and as devisee aforesaid, everything of value which it has received under the said contract of July 21, 1906, and the various modifications thereof hereinbefore referred to, upon condition that the said defendant do likewise, that is to say, upon condition that there be

repaid to this complainant all sums which this Court may find this complainant to be entitled to as a condition of such restoration.

XII.

That no decree of distribution has ever been entered or made in the matter of the estate of the said Frederic Beaudry, deceased, by the Superior Court of the State of California, in and for the City and County of San Francisco, or by any other court, and no order has ever been made by the said court, or any other court, in the matter of the estate of the said decedent distributing any portion of the property of the said decedent; that the complainant, The Trinity Gold Dredging & Hydraulic Company, at no time since the death of the said Frederic Beaudry, nor before said time, had any officers who were or are residents of the State of California; that during all the times since the death of said Frederic Beaudry, deceased, the officers of said corporation, and all the officers thereof, have [33] been and are as follows: Vinet A. Whipple, president and treasurer; Henry Webster, vice-president; and Louis C. Konkle, secretary; that since the death of the said Beaudry and prior thereto the principal office of said corporation has been at the City of Tucson, State of Arizona, but the office for the transaction of the corporate business of said corporation has been and still is at Minneapolis, in the State of Minnesota, where all of said officers of said corporation reside; that ever since the death of said Beaudry all the officers of said corporation have been at all times and now are out of and absent from the State of California with the exception that said Konkle was present in San Francisco,

in said State of California, from about the 22d day of December, 1912, to about the 10th day of January, 1913; that at said time said Konkle, in behalf of said Company, went to the State of California, and was present therein, among other things, for the purpose of investigating and getting information in regard to the status of said Beaudry estate, and that then and there, to wit, on or about the 22d day of December, 1912, said Konkle was informed for the first time that a notice had been given and published by the said executrix of the last will and testament of the said Frederic Beaudry, deceased, to the creditors of the said decedent, requiring persons having claims against him to exhibit them with the necessary vouchers to the said executrix; that at no time prior to the said 22d day of December, 1912, did the said corporation, or any officer thereof, have any knowledge or notice as provided in Chapter VI of Title XI, Part III, of the Code of Civil Procedure of the State of [34] California; that at no time prior to the said 22d day of December, 1912, did the said corporation, or any officer of said corporation, have any knowledge or notice of any notice by the executrix of the last will and testament of said Frederick Beaudry, deceased, to the creditors of said decedent requiring all persons having claims against him to exhibit them with the necessary vouchers to said executrix; that at no time prior to the said 22d day of December, 1912, did the said corporation, or any officer of the said corporation, have any knowledge or notice of the publication of any such notice, or of any notice to the creditors of the said decedent, or any knowl-

edge or notice of the fact that any such notice, or any notice, to the creditors of the said decedent had been published or given, or any knowledge or notice of the time when the presentation of its claim against the said estate would be barred; that at all times from the date of the death of the said decedent until subsequent to the said 22d day of December, 1912, the said corporation and all its officers were ignorant of the publication of any notice to the creditors of the said deceased; that at no time prior to the said 22d day of December, 1912, had any of the officers of the said corporation seen any such notice or publication or been informed of any such notice or publication; that it was not until the said 22d day of December, 1912, that the said corporation and its officers for the first time learned of such notice to creditors and of such publication of such notice; that said corporation had no knowledge or notice aforesaid by reason of the fact that it was out of the State of California, as hereinbefore set forth. [35]

That heretofore and on or about the 27th day of January, 1913, it was made to appear by the affidavit of the officers of the said complainant, The Trinity Gold Dredging & Hydraulic Company, to the satisfaction of the Honorable E. P. Mogan, a Judge of the said Superior Court of the State of California, in and for the City and County of San Francisco, that the said The Trinity Gold Dredging & Hydraulic Company, had, as hereinbefore set forth, no notice to the creditors of the estate of the said Frederic Beaudry, deceased, as provided by Chapter VI, Title XI, Part III, of the Code of Civil Procedure

of the State of California; that heretofore and on or about the 27th day of January, 1913, the affidavits of the officers of the said complainant, The Trinity Gold Dredging & Hydraulic Company, setting forth, as hereinbefore set forth, that the said The Trinity Gold Dredging & Hydraulic Company had no such notice and setting forth the facts in connection therewith hereinbefore set forth, were presented to the said Honorable E. P. Mogan, as Judge of the said Court, and then and thereupon and heretofore and on or about the said 27th day of January, 1913, the said Honorable E. P. Mogan, as Judge of the said court, duly gave and made his order permitting and authorizing the said complainant, The Trinity Gold Dredging & Hydraulic Company, to present its claim, or any claim, against the estate of the said Frederic Beaudry, deceased, to the executrix of the last will and testament of the said Frederic Beaudry, deceased, at any time before a decree of distribution should be entered in the matter of the said estate; that thereafter and in pursuance of the said order and on or about the 27th day of [36] January, 1913, and prior to the entry of any decree of distribution in the said estate and heretofore the said complainant duly presented to the said Angele Beaudry, as executrix of the last will and testament of said decedent, its claim against the said estate based upon and growing out of the facts hereinbefore in this bill of complaint set forth and for the sum of \$304,169, with interest thereon at the rate of seven (7) per cent per annum from the 31st day of December, 1912, and for the enforcement of its lien

therefor against the property hereinbefore described; that the said claim so presented was supported by the affidavit of Louis C. Konkle on behalf of the said claimant; that the said affidavit stated that the amount was justly due, that no payments had been made thereon which were not credited and that there were no offsets to the same to the knowledge of the affiant, and in the said claim as so presented the particulars of the said claim were stated; that the said Louis C. Konkle in his said affidavit set forth the reason why the said affidavit was not made by the claimant; that the said claim so presented was accompanied by copies of the instruments on which the same was founded.

That a copy of the said claim as so presented is attached to this bill of complaint and marked Exhibit "A."

That thereafter and heretofore and in pursuance of the order of the said Honorable E. P. Mogan hereinabove mentioned, and on or about the 28th day of January, 1913, and prior to the making or entry of any decree of distribution in the matter of the estate of the said Frederic Beaudry, deceased, a further claim to like effect and for [37] the same relief was likewise presented to the said Angele Beaudry, as executrix of the last will and testament of the said deceased, supported by the affidavit of Charles W. Willard on behalf of the said complainant; that the said affidavit stated that the amount of the said claim was justly due, that no payments had been made thereon which were not credited, and that there were no offsets to the same to the knowledge of the affiant, and in the said claim as so presented

the particulars of the said claim were stated; that in the said affidavit, the said Charles W. Willard set forth the reasons why the said affidavit was not made by the claimant; that the said claim so presented was accompanied by copies of the instruments upon which the same was founded.

That the said claim so presented was in the words and figures of the claim a copy whereof is attached to this bill of complaint and marked Exhibit "A," except as regards the witnessing clause and affidavit thereto, and that a copy of the witnessing clause and affidavit to the said claim is hereto attached and marked Exhibit "B."

That no action was taken upon the said claims, or either of them, by the said executrix until the 5th day of March, 1913; that on the said 5th day of March, 1913, the said Angele Beaudry, as executrix as aforesaid, rejected the said claims, and both of them, and gave written notice to the holder of said claims and to the person presenting the same that the same were rejected.

XIII.

That complainant has by reason of the facts hereinbefore set forth an equitable lien upon all the right, title [38] and interest of said Fred Beaudry, and of said estate, and of the executrix thereof, and of the defendant, Angele Beaudry, in and to the said properties named in said contract as security for the repayment to complainant of the sums expended by it, as aforesaid, and as a condition precedent to the restoration by complainant to said estate, or to said defendant as executrix, or individually, of the rights

and properties so held by complainant under said contract.

XIV.

That said defendant, Angele Beaudry, as such executrix and sole devisee, threatens and intends to, and, unless restrained by the order of this Honorable Court, the said defendant, Angele Beaudry, as such executrix and sole devisee, will ignore the said notice of rescission so served by complainant, and will declare said contract terminated and all rights of the complainant thereunder forfeited by reason of the failure of complainant to pay the instalment of the purchase price of the said property provided by the said contract, as modified, to be paid on the 1st day of January, 1913, and intends to and will assert title to the properties, the subject of said contract, without regard to the said contract, and intends to and will seek to recover to the said estate of the said Fred Beaudry, deceased, and to said defendant, Angele Beaudry, as executrix, and individually, the said properties, without reimbursing complainant for the amounts paid by it, as aforesaid, and intends to and will institute and prosecute suits and proceedings to that end.

XV.

That the defendant, Whitelaw, claims some interest in [39] and to said property so in possession of complainant by, through and under the said contract adverse to the claim of this complainant, and for the purpose of holding the same as second party and purchaser thereunder for his own benefit and for the benefit of the said Angele Beaudry, as such executrix and sole devisee, but that all right,

title, interest or claim whatsoever of the said defendant, Whitelaw, in or to the said contract, or in or to said property, is subject and subordinate to the rights of complainant herein as hereinbefore set forth.

XVI.

That the matter in dispute in this suit and the value of the said properties, the subject of the said contract, and of that portion thereof as to which title has not failed, as hereinbefore set forth, very much exceeds, exclusive of interest and costs, the sum or value of \$3,000.

WHEREFORE, complainant prays for a judgment against the defendant, Angele Beaudry, as executrix of the last will and testament of the said Frederick Beaudry, deceased, in the sum of \$304,169, together with interest thereon at the rate of 7% per annum from the 31st day of December, 1912.

And for the judgment and decree of this Court adjudging and decreeing that the complainant has a lien upon the properties hereinbefore in this bill of complaint described and upon all right, title and interest of the estate of the said Freredick Beaudry, deceased, in and to the said properties, or any of them, as security for the payment to complainant of the said sum with interest, as aforesaid. [40]

That in and by the said judgment and decree this Honorable Court determine that the said contract of July 21, 1906, hereinbefore referred to, has been rightfully rescinded by this complainant, and that by the said judgment and decree it enforce the said rescission.

That in and by the said judgment and decree there be determined and established the sum to be repaid

to complainant upon such rescission as a condition to the restoration by the complainant of what it has received under the said contract and for the repayment of which it has a lien on the properties, the subject of the said contract, and that it be so determined and established that the said sum is the sum of \$304,169, together with interest thereon at the rate of 7% per annum from the 31st day of December, 1912; and that it be adjudged and decreed that the said defendant, Angele Beaudry, as executrix, or individually, as aforesaid, is not entitled to the restoration of the said properties or of the possession thereof, except upon condition that there be repaid to complainant the said sum with interest, as aforesaid.

That in and by the said judgment and decree the lien of complainant hereinbefore referred to be foreclosed, and that it be ordered that the said properties and all right, title and interest of the estate of the said Frederic Beaudry, deceased, and of the said defendant, as executrix, and individually, in and to the said properties be sold in the manner provided by law to satisfy the said lien, and that out of the proceeds of the said sale, after the payment of the expenses of such sale, there be first paid to complainant the said sum with interest, as aforesaid, and that [41] until such sale the complainant shall be entitled to remain in possession of the said properties, and all thereof, with all the privileges given it by the said contract; and that judgment be entered herein against the said defendant, Angele Beaudry, as executrix of the last will and testament of Frederic Beaudry, deceased, payable in due course of the

administration of the said estate, for any deficiency which may remain after applying all the proceeds of the sale of the said premises to the expenses of such sale and the amount due complainant as hereinbefore set forth; that the complainant may become a purchaser at said sale; and that the purchaser at said sale be let into the possession of the said premises on production of the sheriff's or commissioner's deed therefor.

Or that in the alternative it be further ordered, adjudged and decreed in and by the said judgment and decree that if the said defendant, Angele Beaudry, as executrix, or individually, shall fail, on or before a date to be fixed in the said decree, to pay to the said complainant the said sum with interest, as aforesaid, and all other sums which it may be found by the said Court that the said complainant is entitled to have paid to it upon the said rescission, as aforesaid, then the complainant shall be and become the owner of the said properties free from all claims of any kind thereon or thereto of the said estate of the said Fred Beaudry, deceased, or of the said Angele Beaudry, as executrix, or individually.

That it be further adjudged that all right, title and interest of the said defendant, George H. Whitelaw, in and to the said properties and in and to the said contract of [42] July 21, 1906, is subject and subordinate to the rights of the complainant, as in this bill of complaint alleged, and that in and by the said decree of foreclosure, as aforesaid, there shall be also foreclosed all rights of the said defendant,

George H. Whitelaw, in and to the said property and the said contract.

And the said defendants, and each of them, their agents, attorneys, servants and employees, shall, by the decree of said Court herein be perpetually stayed and enjoined from making or asserting any claim of title in and to the said properties, or any of them, except subject to the rights of the complainant therein, as in this complaint set forth, and that the said defendants, and each of them, their agents, attorneys, servants and employees be so restrained and enjoined from attempting to enforce as against this complainant any forfeiture of its rights under the said contract, or in or to the said properties, or any portion thereof, or from seeking to obtain possession of the said properties, or any portion thereof, otherwise than upon condition that there is first repaid to this complainant the said sum of \$304,169, with interest as aforesaid, and all other sums which it may be found that the said complainant is entitled to have paid to it upon the rescission of the said contract, as aforesaid, and from maintaining any suits, actions or proceedings to that end.

And that complainant may recover its costs and expenses herein, and for such other and further relief as the equity of the case may require and to your Honors may seem meet. [43]

And may it please your Honors to grant unto your orator writs of subpoena to be issued out of and under the seal of this Honorable Court against Angele Beaudry, as executrix of the last will and testament of Frederic Beaudry, deceased, Angele

Beaudry, individually, and George H. Whitelaw, commanding all of them, and each of them, on a day certain and under a certain penalty in the said writ to be inserted, personally to be and appear before your Honors in this Honorable Court, and then and there full, true and perfect answer make to all and singular the premises, an answer under oath being hereby expressly waived; and further to stand, perform and abide by such further orders, directions and decrees therein as to your Honors may seem meet and agreeable to equity and good conscience.

THE TRINITY GOLD DREDGING &
HYDRAULIC COMPANY.

By McCUTCHEN, OLNEY & WILLARD,
Its Solicitors.

McCUTCHEN, OLNEY & WILLARD,
Solicitors for Complainant. [44]

Exhibit "A" [to First Amended Bill of Complaint].

*In the Superior Court of the State of California, in
and for the City and County of San Francisco.*

No. 12,732.

In the Matter of the Estate of FREDERIC BEAUDRY, Deceased.

**Claim of the Trinity Gold Dredging & Hydraulic
Company.**

The undersigned, THE TRINITY GOLD DREDGING & HYDRAULIC COMPANY, a corporation, creditor of Frederic Beaudry, deceased, and of the estate of said Frederic Beaudry, deceased, hereinafter called the claimant, presents this its claim against the estate of said deceased to Angele

Beaudry, the executrix of the last will and testament of said Frederic Beaudry, deceased, and alleges as follows, to wit:

That the above-named claimant was organized as a corporation under the laws of the then Territory (now State) of Arizona on the 25th day of November, 1908, and ever since its organization as such has been and now is a corporation duly organized under the laws of the said State (formerly Territory) of Arizona, with its principal office at Tucson, in said State, and having an office for the transaction of its corporate business at Minneapolis, in the State of Minnesota. [45]

That the above-named deceased during his lifetime and on or about the 21st day of July, 1906, made and entered into an agreement in writing with one George H. Whitelaw, a copy of which said agreement is hereto attached, marked Exhibit "A," and made a part hereof.

That the Fred Beaudry named in and who executed the said agreement was the same person as the Frederic Beaudry, deceased, above named.

That since the execution of the said agreement, the parties thereto, or their successors in interest, have made and entered into various other agreements in writing modifying the said agreement of July 21, 1906, copies of which said modifying agreements are hereto attached, marked Exhibits "B," "C," "D," "E," and "F," and made a part hereof.

That after the execution of said agreement of July 21, 1906, and on or about the 20th day of August, 1907, the said George H. Whitelaw trans-

ferred and assigned the said agreement and all his interest therein and thereunder, and all his interest in and to the property, the subject of the said agreement, to one William D. Beam, one V. A. Whipple, and himself, the said George H. Whitelaw; that thereafter and heretofore the said Whitelaw, Beam and Whipple transferred and assigned the said agreement and all their interest therein and thereunder, and all their interest in and to the property, the subject of the said agreement, to The Trinity Gold & Timber Company, a corporation, Trinity Gold Milling Company, a corporation, and this claimant, The Trinity [46] Gold Dredging & Hydraulic Company; that thereafter and heretofore, and prior to the death of the said Frederic Beaudry, the said The Trinity Gold & Timber Company and the said Trinity Gold Milling Company transferred and assigned the said agreement and all their interest therein and thereunder, and all their interest in and to the property, the subject of the said agreement, to this claimant, The Trinity Gold Dredging & Hydraulic Company; that this claimant has become by mesne assignments the sole assignee and owner of the said agreement of July 21, 1906, and of all of the rights of the said Whitelaw as second party and purchaser under said agreement, and of all of the rights of the said Whitelaw in and to the property, the subject of the said agreement, and of all of the rights of the prior assignees and holders of said agreement in and under the said agreement, and in and to the property, the subject thereof, and now is such owner and assignee of said rights as purchaser and second party

under said agreement of July 21, 1906, and has been such owner and assignee since prior to the death of the said Frederic Beaudry; that in and by the various modifications of the said agreement of July 21, 1906, hereinbefore referred to, the times for making payments of the various instalments of the purchase price of the property, the subject of the said agreement, were changed and postponed, and the said modifications imposed other obligations on the purchaser thereunder for the payment and expenditure of other sums of money in connection with said agreement and the property, the subject thereof, than as provided in the said original agreement, but that none of said modifications affected or altered [47] in any way the obligation of the said Frederic Beaudry as first party in the said agreement to sell and convey the property, the subject of the said contract, by good and sufficient deed, free from all encumbrances, upon payment of the purchase price thereof by the second party at the times provided by the said agreement and its modifications, and performance by the second party of the terms and conditions of said agreement and its modifications on the part of the second party to be performed; that in addition to the express modifications of the said agreement hereinbefore referred to, the first party to the said agreement from time to time waived failures and delay on the part of the second party in making payments on account of the purchase price of the property, the subject of the said agreement, and on the 31st day of December, 1912, said agreement and its modifications were in full force and effect, and all instalments of

the purchase price which had theretofore, under the provisions of the said agreement, as so modified, become due and payable, had been paid by this claimant and its predecessors in interest as second party under the said agreement and had been accepted by the first party and his successors under said agreement, and under the terms of the said agreement and its modifications there remained to be paid of the purchase price of the property therein provided for only the sum of \$50,000, with interest thereon at the rate of 8% per annum from the 1st day of January, 1912, the said sum being payable under the said agreement, as so modified, on the 1st day of January, 1913. [48]

That in and by the said agreement of July 21, 1906, the said Frederic Beaudry, deceased, as first party therein, agreed to sell to the said Whitelaw and to his assigns who should succeed to the interest of said Whitelaw as second party and vendee in said agreement certain lands and properties situated in Trinity County, State of California, hereinafter described, and agreed to convey the same to said Whitelaw or his assigns, as aforesaid, upon the payment of the purchase price in the said agreement fixed, by good and sufficient deed, free from all encumbrances; that in and by the said agreement the said Frederic Beaudry did represent and guarantee that he was the sole owner of the real property, the subject of the said agreement, and of all the timber thereon, and of all improvements thereon, and fixtures and personal property belonging to and used in connection therewith; that the said lands and properties, the subject of the said agreement, were and are

located in Township 35 North, Range 8 West, Mount Diablo Base and Meridian, in said Trinity County, State of California, and are described as follows, to wit:

Certain gravel mines, together with the timber, the improvements thereon, and fixtures and personal property belonging to and used in connection therewith, including pipes, flumes, ditches, sawmills, block-mill, giants, tools, buildings, furniture and the first right to six thousand (6,000) inches of water from the East Fork of Stewarts Fork of the Trinity River, and water rights from Strophe Creek, including those certain mining claims and properties known as: [49]

Minersville No. 1, 160 acres more or less, patented.

Minersville No. 2, 160 acres more or less, patented.

Minersville No. 3, 160 acres more or less, patented.

Red Gulch, 140 acres more or less, patented.

Ridge, 160 acres more or less, patented.

Gassy Hill, 160 acres more or less, patented.

Head of Digger Creek, 160 acres more or less, patented.

Diener, 160 acres more or less, patented.

Diener No. 2, 160 acres more or less, unpatented.

Mule Creek Ridge, 160 acres more or less, unpatented.

Long Gulch, 120 acres more or less, unpatented.

Connection, 40 acres more or less, unpatented.

Sweet Gulch, 160 acres more or less, unpatented.

Little Mule No. 2, 160 acres more or less, unpatented.

Strope Creek, 160 acres more or less, unpatented.

Little Mule, 160 acres more or less, unpatented.

Greenhorn Flat, 160 acres more or less, Receiver's Receipt.

Greenhorn Flat No. 2, 160 acres more or less, Receiver's Receipt.

Greenhorn Gulch, 140 acres more or less, Receiver's Receipt.

Taylor Gulch, 160 acres more or less, Receiver's Receipt.

Lane Gulch, 160 acres more or less, Receiver's Receipt.

That as to the said mining claims opposite which, as hereinbefore set forth, the word "patented" occurs, the said Frederic Beaudry represented and guaranteed that the said mining claims had been patented, and that he was the sole owner in fee thereof; that as to the said mining claims opposite which, as hereinbefore set forth, the word "unpatented" occurs, the said Frederic Beaudry represented and guaranteed that he was the sole owner thereof as valid mining claims held by valid mining locations under the laws of the United States validly made; that as to the said mining claims opposite which, as hereinbefore set forth, the words "Receiver's Receipt" occurs, the said Frederic Beaudry represented and guaranteed that he was the sole owner of the said claims as valid mining claims held by valid mining locations under the laws of the United States validly made, and that Receiver's Receipts had been duly issued to him by the United

States Government as such owner under valid [50] applications for patent therefor from the United States Government, in pursuance of which said applications full consideration therefor had been paid to the United States Government; and in and by the said agreement the said Frederic Beaudry represented and guaranteed the validity of the patents thereon as to all those mining claims upon which patents had been issued, as hereinbefore set forth, and the validity of the locations and mining claims thereon as to those claims which were unpatented, and the validity of the mining claims and locations and Receiver's Receipts thereon as to those tracts upon which Receiver's Receipts had been issued, as hereinbefore set forth, and in and by the said agreement the said Frederic Beaudry guaranteed that upon the payment of the consideration provided for by the said agreement he would convey good and valid title, as aforesaid, to all of the said properties and mining claims, with the timber thereon, free from all liens and encumbrances.

That in and by the said agreement it was further provided that the second party thereto should make necessary improvements and repairs on the said property so as to put certain of the mining claims thereon in complete readiness for exploitation; also that on certain other property the purchaser should place a working hydraulic plant, build a new flume, enlarge the ditch for the purpose of carrying water to the said properties, build a wagon road to certain of the said properties, and put up a telephone along the line of the water ditch supplying the said prop-

erties with water and connect it with the main through telephone line, and that the purchaser should spend not less than \$10,000 in making such improvements. [51]

That in and by the said various modifications of the said agreement it was further provided that the purchaser should pay other expenses in connection with the said agreement and the properties thereby affected.

That up to the time of the rescission of the said agreement by this claimant, as hereinafter stated, this claimant and its predecessors in interest as second party and purchaser in and under the said agreement, as hereinbefore set forth, have at all times duly and punctually performed all the [52] obligations, terms, conditions and covenants of the said agreement, as modified, as hereinbefore set forth, on their part to be performed, and have made all the payments provided by the said agreement, as so modified, to be made up to the time of such rescission.

That this claimant and its predecessors in interest as second party and purchaser under said agreement, as hereinbefore set forth, have paid to the said Frederic Beaudry and to his estate, as principal of the purchase price provided by the said agreement, the sum of \$200,000, and as interest on deferred payments and as consideration for deferring the said payments on account of the said purchase price by the modifications of the said original agreement, as hereinbefore set forth, the further sum of \$20,950; that this claimant and its said predecessors in interest have further paid and expended upon the im-

provements provided to be constructed on the said property under the said agreement, as hereinbefore set forth, and for other expenses in connection therewith, as provided by the said contract and the various modifications thereof, hereinbefore provided for, a sum not less than \$83,219; that all said payments aggregating the sum of not less than \$304,169 were so made prior to the 1st day of March, 1912; that claimant and its predecessors in interest, as aforesaid, have further expended in the care and management of said property, and in the operation of the said mining claims, and prior to the 1st day of December, 1911, further large [53] sums which at all times have been and are largely in excess of any and all receipts from said operation.

That at the time of the execution of the said agreement of July 21, 1906, said Frederic Beaudry was not, and at no time since said date has he, nor has the estate of said Frederic Beaudry, deceased, nor has the executrix of his last will and testament, nor has the sole devisee under his will, been the sole owner in fee, or the owner in fee at all, of those of the mining claims hereinbefore referred to, designated as Mule Creek Ridge, Long Gulch, Greenhorn Flat, Greenhorn Flat #2, Greenhorn Gulch, Taylor Gulch and Lane Gulch, or any thereof; as valid mining claims held by valid mining locations or otherwise; that the locations and mining claims on the said claims last above named were not at any of said times, and are not, and never have been, valid mining claims held by valid mining locations under the laws of the United States validly made, nor has any

one of them at any of said times been, nor is any one of them, a valid mining claim held by valid mining locations under the laws of the United States validly made; that the said Frederic Beaudry was not at the time of the making of said agreement of July 21, 1906, nor at any time thereafter up to the time of his death, nor since his said death has his said estate, nor his executrix, nor his sole devisee, been able to, nor is the said estate, nor the said executrix, nor the said sole devisee, now able to, convey a good and valid title, or any valid title, to any of the said mining claims hereinbefore in this paragraph specifically designated, whether [54] with or without timber thereon, or to any of the said properties or mining claims; that at no time since the making of the said agreement and up to the time of his death was the said Frederic Beaudry, nor since his said death has the estate of the said Frederic Beaudry, deceased, nor has his said executrix, nor his sole devisee, been, nor are they, or any of them, now able to comply with the terms, conditions and provisions of the said agreement of July 21, 1906, on the part of the said Frederic Beaudry to be performed in this: that at none of the said times were they, or any of them, able, nor are they, or any of them, now able, to convey the said mining claims hereinbefore in this paragraph of this claim specifically designated, or any thereof, by good and sufficient deed, nor by any deed at all.

That since the 1st day of March, 1912, and since the last payment by this claimant under the said agreement, as hereinbefore set forth, or on account

of the purchase price of the properties, the subject of the said agreement, final decision has been rendered by the United States Government on applications for patent made on behalf of the said Frederic Beaudry under the mining locations hereinbefore referred to as the Mule Creek Ridge and Long Gulch mining claims to the effect that the said mining claims have not been validly located as such, and that they were not and are not valid mining claims, and that the said Frederic Beaudry has not, nor has his estate, any right, title, estate or interest therein or thereto, and that the said lands covered by the said mining claims are public lands of the United States, [55] free of all claims thereto on the part of the said Frederic Beaudry or of his estate.

That since the said 1st day of March, 1912, the United States Government has further ruled and decided upon applications for patent on behalf of the said Frederic Beaudry to the United States Government covering the claims hereinbefore in this claim described as the subject of Receiver's Receipts that the entries of the said claims so covered by the said Receiver's Receipts were not and are not valid mining claims or held as such under the laws of the United States.

That the aforesaid rulings and decisions of the United States Government have never been revoked, canceled or set aside, and are now in full force and effect, and since the said rulings neither the estate of the said Frederic Beaudry, deceased, nor his executrix, nor said sole devisee, has acquired, nor have they, or any of them, any right whatsoever to

the said Mule Creek Ridge, Long Gulch, Greenhorn Flat, Greenhorn Flat #2, Greenhorn Gulch, Taylor Gulch and Lane Gulch mining claims, or any of them, whether as mining claims, or otherwise, and the said property and premises belong to and are the property of the United States; that the said properties lie within the limits of a forest reserve known as the Shasta National Forest, duly set apart as such under the laws of the United States.

That under the said agreement of July 21, 1906, as so modified, as hereinbefore set forth, the last instalment [56] of the purchase price therein provided for was provided to be paid on the 1st day of January, 1913, as hereinbefore set forth; that the said last instalment amounts, as aforesaid, to the sum of \$50,000, with interest thereon at the rate of 8% per annum from the 1st day of January, 1912; that on or about the 1st day of December, 1912, the executrix of the last will and testament of said Frederic Beaudry, deceased, caused to be served upon this claimant a notice that, unless said balance was paid on the 1st day of January, 1913, she would terminate said agreement of sale and would retake and retain all right, title and interest in and to the said property, without accounting to this claimant or paying to it any of the considerations or payments made, as hereinbefore set forth, by claimant and its predecessors in interest under said agreement.

That the value of all the properties, the subject of the said agreement of July 21, 1906, has at all times consisted, and by all parties to said agreement has at all times been known to consist, chiefly in their value

as placer mining properties and for the timber situated thereon; that the said properties, including said Mule Creek Ridge, Long Gulch, Greenhorn Flat, Greenhorn Flat #2, Greenhorn Gulch, Taylor Gulch and Lane Gulch mining claims, constitute a contiguous body of land and form one entire property, every part of which is a material and substantial portion of the whole, and so known by all parties to [57] constitute such material and substantial portion; that a failure of title to any portion of the said property, and particularly a failure of title to the said mining claims known as the Mule Creek Ridge and Long Gulch mining claims, materially and substantially breaks the continuity of the said tract of land and impairs in a very substantial and considerable degree the value of the said properties.

That a failure of title to the said Mule Creek Ridge and Long Gulch mining claims breaks entirely the continuity of the said tract of land and divides the same into two distinct and separate parcels, and adds very considerable difficulty in the working and operation of the said property as mining claims and in the cutting and removal of the timber therefrom.

That the value of the said properties, the subject of the said agreement of July 21, 1906, omitting therefrom the said mining claims known as Mule Creek Ridge, Long Gulch, Greenhorn Flat, Greenhorn Flat #2, Greenhorn Gulch, Taylor Gulch and Lane Gulch, has been at all times since said 21st day of July, 1906, and is now, less than what the value of the said property, including the said mining claims, would be, by a sum in excess of the sum of

\$60,000, and the impairment in value of the entire tract of land, the subject of said agreement of July 21, 1906, by the exclusion therefrom of the said mining claims last hereinbefore specifically enumerated, has at all times been, and is now, in excess of the amount still remaining unpaid of the purchase price of the said properties as fixed in the [58] said agreement, as so modified, and the damage suffered by this claimant by the failure of the title to the said mining claims has been and is in excess of the amount of the said purchase price so still remaining unpaid.

That the total acreage of the property covered by said agreement was and is 3,160 acres; that the total acreage of the said Mule Creek Ridge and Long Gulch mining claims was and is 280 acres; that the total acreage of the said Greenhorn Flat, Greenhorn Flat #2, Greenhorn Gulch, Taylor Gulch and Lane Gulch mining claims was and is 780 acres.

That the officers of this claimant corporation are all residents of the City of Minneapolis, State of Minnesota, and nonresidents of the State of California, and at no time since the 1st day of December, 1911, and until on or about the 23d day of December, 1912, have any of said officers been in the State of California; that said claimant and its predecessors in interest did not know or learn, nor did any of them know or learn, of the said defects in the title of the said Frederic Beaudry and his estate to the said properties until subsequent to the 1st day of March, 1912, and until shortly before the rescission of said agreement, as hereinafter set forth; that by

reason of the inability of the estate of the said Frederic Beaudry, deceased, and of the executrix of the last will and testament of the said estate, as hereinbefore set forth, to comply with the provisions of said agreement of July 21, 1906, on their part to be performed, and by reason of the failure of the consideration for the said agreement, as hereinbefore set forth, [59] and promptly upon the discovery of such failure of consideration and in due time and before the time for making final payment of the purchase price of the said properties, as provided in the said agreement of July 21, 1906, and its various modifications, as hereinbefore set forth, and on or about the 31st day of December, 1912, this claimant rescinded the said agreement and caused to be served upon the executrix of the last will and testament of said Frederic Beaudry, deceased, and upon the sole devisee under the said last will and testament of said deceased, a notice of rescission wherein and whereby this claimant notified said executrix and devisee that it did rescind the said agreement of July 21, 1906, because of such failure of consideration, and because the said Frederic Beaudry had not been in his lifetime, and the said executrix and the said devisee was not and would not be, able to convey the properties mentioned in said agreement and upon the consideration for which the said payments had been made by the claimant, as aforesaid; that this claimant did then and there offer to restore to said executrix and devisee everything of value which it had received under the said agreement upon condition that the said executrix and devisee did likewise; that this

claimant then and there offered to restore to said executrix and devisee all the property which had come into the possession of this claimant under the said agreement and to restore and reconvey all rights received by this claimant thereunder on the condition that the said executrix and devisee repay to this claimant all sums paid by this claimant and its predecessors in interest under the said agreement as and for the purchase price therein provided for and for improvements on the said property made in pursuance of the provisions of the said agreement; that the said amounts [60] so to be repaid were stated and fixed in said offer at the sum of \$200,000, provided the said offer were accepted on or about the 6th day of January, 1913; that in and by the said notice of rescission this claimant stated further that in case such offer were not so accepted on or about the said date, the claimant reserved the right to require, as a condition for the restoration of the said property by complainant, the payment to it of such further sums, in addition to the said sum of \$200,000, as the claimant might be entitled to.

That the said executrix and devisee did not on or about the said 6th day of January, 1913, accept, nor has she at all accepted, the said offer of this claimant or repaid to this claimant the said sums of money, or any part or portion thereof.

That this claimant hereby offers to restore to the said executrix and devisee everything of value which it has received under the said agreement of July 21, 1906, and the various modifications thereof hereinbefore referred to, upon condition that the said ex-

executrix and devisee do likewise, that is to say, upon condition that there be repaid to this claimant the sum of \$304,169, with interest thereon at the rate of 7% per annum from the 31st day of December, 1912.

That this claimant has, by reason of the facts hereinbefore set forth, an equitable lien upon all the right, title and interest of said Frederic Beaudry, deceased, and of said estate, and of the executrix thereof, and of the sole devisee thereof, in and to the said properties named in said agreement [61] and hereinbefore described, as security for the repayment to this claimant of the sums expended by it, as aforesaid, and as a condition precedent to the restoration by this claimant to said estate, or to said executrix and devisee, of the rights and properties so held by this claimant under said agreement.

That this claimant presents, accordingly, its claim against the estate of said Frederic Beaudry, deceased, for the said sum of \$304,169, with interest thereon at the rate of 7% per annum from the 31st day of December, 1912, and for the enforcement of its lien therefor, as aforesaid, against the said property, and avers that the facts in regard to the said claim and all items thereof are as hereinbefore in this claim set forth; that all the items of the said claim, except those relating to interest hereafter accruing, are now due; that this claimant had no notice to creditors of the estate of the said Frederic Beaudry, deceased, as provided in Chapter VI of Title XI, Part III, of the Code of Civil Procedure of the State of California, by reason of being out of the State of California; that in so far as said claim is founded

on any instrument, a copy of such instrument is hereto attached; that the said claim is secured by an equitable lien on the property described in said agreement of July 21, 1906, as hereinbefore set forth, and by reason of the facts hereinbefore set forth; that the said claim is not contingent.

IN WITNESS WHEREOF, the said The Trinity Gold Dredging [62] & Hydraulic Company has caused this claim to be executed this 22 day of January, 1913, by its proper officers thereunto duly authorized.

THE TRINITY GOLD DREDGING &
HYDRAULIC COMPANY,

By VINET A. WHIPPLE,

President,

[Corporate Seal.] By LOUIS C. KONKLE,

Secretary,

Claimant. [63]

State of Minnesota,

County of Hennepin,—ss.

Louis C. Konkle, being first duly sworn, deposes and says:

That he is an officer, to wit, the Secretary, of The Trinity Gold Dredging & Hydraulic Company, a corporation, the claimant named in the foregoing claim, and whose claim is hereby presented to the executrix of the last will and testament of Frederic Beaudry, deceased; that affiant makes this affidavit on behalf of said corporation for the reason that the claimant is a corporation, and for the further reason that the facts constituting the said claim are peculiarly within the knowledge of affiant; that affiant has read the

foregoing claim and statement of claim and knows the contents thereof, and the same is true and correct to affiant's knowledge; that the particulars of such claim, as set forth in the foregoing statement, are, and each of them is, true; that the amount thereof is justly due; that no payments have been made on the amount of said claim which are not credited and that there are no offsets to the same to the knowledge of affiant;

That the said claimant is a corporation organized under the laws of the State (formerly Territory) of Arizona, with its principal office at Tucson, in said State, and having an office for the transaction of its corporate business at Minneapolis, in the State of Minnesota, and that at no time since its organization has the said corporation had, nor has it now, any office of any kind in the State of California, [64] and that the said corporation has at all times since its organization been, and it is now, out of and absent from the State of California; that at all said times all of the officers of the said corporation have resided, and now reside, outside of the State of California, and that at no time since prior to the death of Frederic Beaudry, deceased, on or about the 16th day of December, 1911, until on or about the 22d day of December, 1912, was any of the officers of the said corporation in the said State of California, and that at all of said times from the date of the death of the said deceased to the said 22d day of December, 1912, the said officers, and all of them, were absent from and out of the State of California; that at no time prior to the said 22d day of December, 1912, did the

said corporation, or any officer thereof, have any knowledge or notice, as provided in Chapter VI of Title XI, Part III, of the Code of Civil Procedure of the State of California; that at no time prior to said 22d day of December, 1912, did any officer of the said corporation have any knowledge or notice of any notice by the executrix of the last will and testament of said deceased to the creditors of said decedent, requiring all persons having claims against him to exhibit them, with the necessary vouchers, to such executrix, or any knowledge or notice of the publication of any such notice, or of the fact that any such notice had been published or given; that said claimant had no knowledge or notice, as aforesaid, by [65] reason of the fact that it was out of the State of California. And affiant further states that the original instruments, of which the hereto attached Exhibits "A," "B," "C," "D," "E" and "F" are copies, cannot now be found among the papers of the said claimant, The Trinity Gold Dredging & Hydraulic Company, nor anywhere, and that affiant has made diligent search for the same and each of the same, and that the same and each of the same are either lost or destroyed.

LOUIS C. KONKLE.

Subscribed and sworn to before me this 22d day of January, 1913.

[Notarial Seal]

EDYTH MEYERS,

Notary Public in and for the County of Hennepin,
State of Minnesota.

My commission expires June 8, 1917.

State of Minnesota,
County of Hennepin,—ss.

I, P. S. Neilson, Clerk of the District Court for the County of Hennepin, Fourth Judicial District of the State of Minnesota, the same being a court of record and having a seal, do hereby certify that Edyth Meyers, whose name is subscribed to the certificate of proof or acknowledgment of the annexed instrument, was, at the time of taking such proof or acknowledgment a notary public, in and for said county, residing in said county, and duly authorized by the laws of said State to take and certify acknowledgments or proofs of deeds of lands in said State, that I am well acquainted with the handwriting of the said notary, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at the City of Minneapolis, in said County, this 22d day of Jan., A. D. 1913.

[Seal]

P. S. NEILSON,
Clerk.

By C. F. Williams,
Deputy. [66]

EXHIBIT "A."

This Agreement, made and entered into this 21st day of July, 1906, A. D., by and between FRED BEAUDRY, of the City and County of San Francisco, State of California, the party of the first part,

and GEORGE H. WHITELOW, of Delta, State of California, the party of the second part;

WITNESSETH:

The said FRED BEAUDRY, the party of the first part, *being the sole owner and in possession of certain gravel mines*, together with the timber, the improvements thereon and fixtures and personal property belonging to and used in connection therewith, including pipes, flumes, ditches, saw-mills, block-mill, giants, tools, buildings, furniture and the first right to six thousand (6000) inches of water from the East Fork of Stewarts Fork of the Trinity River, and water rights from Strophe Creek, all located in township 35, North of Range 8 West, Mount Diablo Base and Meridian in Trinity County, Calif.; *including these certain mining claims and properties known as:*

Minersville No. 1, 160 acres more or less, patented.

Minersville No. 2, 160 acres more or less, patented.

Minersville No. 3, 160 acres more or less, patented.

Red Gulch, 140 acres more or less, patented.

Ridge, 160 acres more or less, patented.

Gassy Hill, 160 acres more or less, patented.

Head of Digger Creek, 160 acres more or less, patented.

Diener, 160 acres more or less, patented.

Diener No. 2, 160 acres more or less, unpatented.

Mule Creek Ridge, 160 acres more or less, unpatented.

Long Gulch, 120 acres more or less, unpatented.

Connection, 40 acres more or less, unpatented.

Sweet Gulch, 160 acres more or less, unpatented.

Little Mule No. 2, 160 acres more or less, unpatented.

Strope Creek, 160 acres more or less, unpatented.

Little Mule, 160 acres more or less, unpatented.

Greenhorn Flat, 160 acres more or less, Receiver's Receipt.

Greenhorn Flat #2, 160 acres more or less, Receiver's Receipt.

Greenhorn Gulch, 140 acres more or less, Receiver's Receipt.

Taylor Gulch, 160 acres more or less, Receiver's Receipt.

Lane Gulch, 160 acres more or less, Receiver's Receipt.

containing a total area of 3160 acres more or less of which 1260 acres have been patented by the United States Government.

Now, therefore, Fred Beaudry, the said party of the first part, in consideration of one (1) dollar to him in hand paid, receipt of which is hereby acknowledged does hereby grant to the said party of the second part an option to purchase the above described mines and mining claims, lands and properties, under the following conditions, to wit: [67]

The party of the second part will enter upon and take possession of the said properties except one house with furniture known as the Fourtlette House, yard and barn, and agrees and binds himself to expend not less than Ten Thousand (\$10,000) Dollars

in improvements on said properties, in the following manner:

First, to make such necessary improvements and repairs as is necessary to put the Chicken Flat workings in complete readiness for exploitation; also to place a working hydraulic plant, consisting of pipes, giants, tools, houses, etc., on the Greenhorn Placers known as Greenhorn Flat No. 2, Greenhorn Gulch, Taylor Gulch, Lane Gulch, Strope Creek, Little Mule; to build a new flume and enlarge the ditch from the East Fork ditch to the Greenhorn Placer in order to carry safely not less than three thousand inches of water; to build a wagon road to the Greenhorn placers; to put up Telephone on ditch route and connect it to the Fairview Line, and to do any and all work in good workmanlike manner. And it is especially understood that the amount of \$10,000.00 shall be expended in fitting up and in improvements of said premises and not be considered as running expenses on the mine. Any sum expended in improvements exceeding the above amount of Ten Thousand (\$10,000) Dollars shall be optional with the party of the second part, and in no wise obligate the party of the first part.

The party of the first part reserves the right for Theodore Ebendorf to prospect on the property until the payment of \$62,500 has been paid, provided that he does not interfere with the interest of the party of the second part.

The party of the first part hereby grants the right to use all of said properties except that above reserved for the purpose of prospecting, developing

and working said mines, and when sixty-two thousand five hundred (\$62,500) dollars has been paid as herein provided for, he will then give complete possession of all of said properties including said Fourtlette House. He also grants to the party of the second part the right to cut and saw into lumber such timber as shall be needed to re-construct flumes, repair buildings and for the working of the mine only, the said party of the second part will not have the right to sell any timber or lumber until full payment of the properties shall have been made.

The total price of said properties shall be and is Two Hundred and Fifty Thousand (\$250,000) Dollars to be paid as follows:

Ten Thousand (\$10,000) Dollars to be paid on or before the 10th day of August, 1907; Fifty-two Thousand and Five Hundred (\$52,500) Dollars on or before the 10th day of October, [68] 1907; Sixty-two Thousand and Five Hundred (\$62,500) Dollars on or before the 10th day of Oct., 1908; Sixty-two Thousand and Five Hundred (\$62,500) Dollars on or before the 10th day of October, 1909; Sixty-two Thousand and Five Hundred (\$62,500) Dollars on or before the 10th day of October, 1910.

After One Hundred and Twenty-five Thousand (\$125,000) dollars shall have been paid to the party of the first part, the party of the second part may have the right to take the deed from escrow by giving notes for balance remaining unpaid, life of the notes to correspond with above specified time of payments secured by mortgage of first lien on all of the above properties, interest at the rate of five per cent per

annum net, the party of the second part agrees to pay any additional amount of interest charged by State or County on said notes to be paid on all unpaid amounts not paid on October 10th, 1908, from that time until paid. The party of the second part obligates himself to pay all taxes of any kind *may* levied upon mortgages or on the above described properties. It is further agreed by the party of the first part to at once upon request of said party of the second part to make a good and sufficient deed for all of said properties, *free from all incumbrances*, with escrow instructions in accordance with above stipulations and place same in some bank in San Francisco or elsewhere agreed by both parties.

The hydraulic elevating operations are to be on the Southeast side below the County road and about Two Hundred (200) feet below the fence and wagon shed, at the Junction of Digger Creek and the East Fork of the Stewarts Fork of the Trinity River, that is to say, the fields as enclosed must not be worked under this agreement, before the payment of Sixty-two Thousand and Five Hundred (\$62,500) dollars has been paid.

It is further agreed between the parties that said party of the first part shall not be responsible in any way for any debts contracted by said party of the second part in or about said properties, and that he may post such notices as he shall see fit upon the said mines in order to protect him from any liens or charges.

Said party of the second part further covenants and agrees that any and all work which he may do or

cause to be done or performed upon said properties by virtue of this agreement shall be done and performed in a good substantial and workmanlike manner. Said party of the second part further covenants and agrees that in the event he fails to make any of the payments herein specified at the time the same becomes due and payable [69] or to carry out the covenants in accordance to this agreement, then this contract shall become null and void, and that thereupon said party of the first part shall be immediately released from any obligation either in law *in equity* to convey said properties or any part or portion thereof, and that any and all moneys paid to said party of the first part shall be forfeited to said party of the first part as liquidated damages discharging the party of the second part from any obligations and that the possession of said properties shall be immediately delivered to said party of the first part without notice or process at law and that tools, machineries, improvements of all kind, stock, placed thereon, shall become the property of the party of the first part free and clear of any charge or claim against the same.

Said party of the second part further covenants and agrees to pay all expenses for prospecting, examining the mines and the title of said properties.

It is clearly understood by both parties that all the tools, saw-mill, pipes, giants, machineries of any kind enumerated in the invoice are to be left on the said properties, in as good condition as when accepted by the party of the second part, in the event he fails to comply with the hereinabove conditions except

natural wear and tear.

This agreement shall be binding upon and inure to the benefit of the parties herein, their heirs, executors, administrators, assigns and successors in interest.

None of said water, tools or personal properties shall be used for any other property except that hereinbefore described, except until One Hundred Thousand (\$100,000) Dollars of said purchase price has been paid.

IN WITNESS WHEREOF, the said parties have hereunto set their hands and seals, the day and year first above written.

(Signed) FRED BEAUDRY.

(Signed) C. H. WHITELOW.

Witnesses:

J. BOUVIER.

ANGELE BEAUDRY. [70]

EXHIBIT "B."

Callahan, California, Aug. 8, '07.

SUPPLEMENT AGREEMENT.

We, the undersigned agree that the *made* and time of payments recited in a contract between us, and attached hereto, and of date of July 21st, 1906, shall be changed to read as follows:

(\$5,000) Five Thousand Dollars on or before Aug.
20/1907;

(\$7,500) Seven Thousand Five Hundred Dollars
on or before Sept. 1/07;

(\$10,000) Ten Thousand Dollars on or before
January 10th, 1908;

(\$5,000) Five Thousand Dollars on or before
March 10th, 1908;

(\$5,000) Five Thousand Dollars on or before
April 10th, 1908;

(\$5,000) Five Thousand Dollars on or before May
10th, 1908;

(\$25,000) Twenty-five Thousand Dollars on or be-
fore June 10/1908;

(\$62,500) Sixty-two Thousand Five Hundred Dol-
lars on or before January 10th, 1909;

(\$62,500) Sixty-two Thousand Five Hundred Dol-
lars on or before January 10th, 1910;

(\$62,500) Sixty-two Thousand Five Hundred Dol-
lars on or before January 10th, 1911;

all with the full and plain understanding that all the
other terms and conditions of the said contract are to
remain as they are and unchanged except as to mode
and time of payment and with the further under-
standing that the time of the last payment is to be
expended so as to keep in full force and effect the
original contract.

FRED BEAUDRY.

G. H. WHITE LAW.

Witnesses:

ED. BOUVIER.

M. J. BOUVIER. [71]

EXHIBIT "C."

ESCROW AGREEMENT.

To the Pioneer Trust Company of Kansas City,
Missouri.

There is herewith deposited by me the undersigned
Fred Beaudry of the City and County of San Fran-

cisco, State of California, with the Pioneer Trust Company of Kansas City, Mo., a certain deed, bearing date the 31st day of October, 1906, made by me, Fred Beaudry, to Geo. H. Whitelaw, of Delta, State of Colorado, granting and conveying unto the latter.

All those certain gravel mines, together with the timber and improvements thereon and all fixtures and personal property, belonging to and used in connection therewith, including pipes, flumes, ditches, sawmill, block-mill, giants, tools, buildings, furniture, and the first right to six thousand (6000) inches of water from the East Fork of Stewarts Fork of the Trinity River and water rights from Strope Creek, all located in Township 35, North of Range 8 West, Mount Diablo Base and Meridian in Trinity County, State of California, including all those certain mining claims and properties known as:

Minersville No. 1, 160 acres more or less, patented.

Minersville No. 2, 160 acres more or less, patented.

Minersville No. 3, 160 acres more or less, patented.

Red Gulch, 140 acres more or less, patented.

Ridge, 160 acres more or less, patented.

Gassy Hill, 160 acres more or less, patented.

Head of Digger Ck., 160 acres more or less, patented.

Diener, 160 acres more or less, patented. [72]

Diener No. 2, 160 acres more or less, unpatented.

Mule Creek Ridge, 160 acres more or less, unpatented.

Long Gulch, 120 acres more or less, unpatented.

Sweet Gulch, 160 acres more or less, unpatented.

Connection, 40 acres more or less, unpatented.

Little Mule No. 2, 160 acres more or less, unpatented.

Strope Creek, 160 acres more or less, unpatented.

Little Mule, 160 acres more or less, unpatented.

Greenhorn Flat, 160 acres more or less, Receiver's Receipt.

Greenhorn Flat #2, 160 acres more or less, Receiver's Receipt.

Greenhorn Gulch, 140 acres more or less, Receiver's Receipt.

Taylor Gulch, 160 acres more or less, Receiver's Receipt.

Lane Gulch, 160 acres more or less, Receiver's Receipt.

containing a total area of three thousand one hundred and sixty (3,160) acres more or less of which twelve hundred and sixty (1260) acres have been patented by the United States Government.

This deed is now delivered to you in escrow to be held by your bank subject to the following terms and conditions: The said Geo. H. Whitelaw is to pay unto your bank for me the following sums of money at the following designated times, the total price of the properties described in said deed shall be and is two hundred fifty thousand (250,000).

Five thousand dollars (\$5000) on or before August 20th, 1907, which have been paid. Seven thousand five hundred dollars (\$7500) on or before

September 15th, 1907, which have been paid. [73]
Ten thousand dollars (\$10,000) on or before January
10th, 1908.

Five thousand dollars (\$5,000) on or before March
10th, 1908.

Five thousand dollars (\$5,000) on or before April
10th, 1908.

Five thousand dollars (\$5,000) on or before May
10th, 1908.

Twenty-five Thou. (\$25,000) on or before June 10th,
1908.

Sixty-two Thousand Five Hundred Dollars (\$62,-
500) on or before January 10th, 1909.

Sixty-two Thousand Five Hundred Dollars (\$62,-
500) on or before January 10th, 1910.

Sixty-two Thousand Five Hundred Dollars (\$62,-
500) on or before January 10th, 1911.

After the sum of One Hundred and Twenty-five
Thousand Dollars (\$125,000) on account of the said
purchase price shall have been paid to the Pioneer
Trust Company of Kansas City, for the account of
the undersigned, the said Geo. H. Whitelaw or his
assigns may have the right to withdraw the said deed
from escrow and shall be entitled to the delivery of
the said deed upon giving satisfactory notes for the
balance remaining unpaid, which notes shall be made
payable at the same periods corresponding with the
unpaid payments hereinabove stipulated, provided
said notes are secured by a first lien mortgage on all
of the property described in the deed hereinabove
referred to, interest to be at the rate of five per cent
(5%) per annum net.

The said Geo. H. Whitelaw or assign to pay any additional amount of interest which may be chargeable for any and all state or county taxes assessed upon the said mortgage which may be due [74] on all amounts not paid before the 10th day of January, 1909, and upon all amounts not paid subsequent to the last-mentioned date. The purchaser is to obligate himself to pay all taxes of any kind which may be levied or assessed upon the said mortgage or upon the property described in the said mortgage or upon any of the improvements situated thereon.

When all such payments shall have been made in the sums and at the times herein specified or when all the conditions herein set forth shall have been carried out by the said purchaser, the said Pioneer Trust Company of Kansas City, Missouri, is hereby instructed to deliver the said deed to the said purchaser, or his assigns, or upon his written order. If all of the said installments of the purchase price be not paid in the amounts and at the times specified and there shall be default in any of such payments required to be made to said Bank by the said purchaser or his assigns, for the period of ten (10) days next after any of said dates, then and in that event said deed on demand by the undersigned, shall be thereby delivered by the said Bank to Fred Beaudry the undersigned.

The escrow agreement and the instruction therein set forth are drawn up pursuant to the terms of a certain contract entered into by and between Fred Beaudry and Geo. H. Whitelaw, on the 21st day of July, 1906, a copy of which is hereto annexed and made a part hereof.

Witness my hand this 11th day of December,
A. D. 1907.

FRED BEAUDRY. [75]

I, the undersigned, the party grantee named in the deed this day deposited with the Pioneer Trust Company of Kansas City in escrow and more fully described in the following escrow agreement, hereby recognize the foregoing as a correct statement of the terms of the escrow and I hereby subscribe the same and acknowledge myself to be bound thereby.

Witness my hand this 11th day of December, A. D. 1907.

GEO. H. WHITELOW.

The foregoing trust is hereby accepted and the said deed specified in the foregoing instructions is accepted subject to the conditions in the foregoing escrow agreement *stejoulated*.

Kansas City, Mo., January 27th, 1908.

PIONEER TRUST COMPANY,

By B. H. McGARVEY,

Treasurer. [76]

EXHIBIT "D."

San Francisco, January 15/09.

Pioneer Trust Company,

Kansas City, Mo.

Dear Sir:

Referring to the Deed, dated October 31, 1909, from myself to Geo. H. Whitelaw, of Delta, State of Colorado, and an Agreement, dated July 21, 1906, deposited in escrow with you, and accompanied by certain instructions, I desire to say, that Geo. H. Whitelaw desires to somewhat defer the payment

which was due January 10th, 1909, and amounting to the sum of Sixty-two Thousand and Five Hundred Dollars (\$62,500.00).

I have consented to defer and somewhat change the terms and conditions of the payment of \$62,500.00 which was due on January 10th, 1909, and in accordance with such change I hereby instruct you as follows:

Mr. Whitelaw is to pay you for my credit, the sum of Ten Thousand Dollars (\$10,000) net cash, and without grace, on the First day of February, 1909; he is to further pay to you for my credit, the sum of Twelve Thousand and Five Hundred Dollars (\$12,500.00), net cash, and without grace, on the fifteenth day of February, 1909; and on February 15th, 1909, Mr. Whitelaw is also to deliver to you for me, his Promissory Note for the sum of Five Thousand Six Hundred and Twenty-five Dollars (\$5,625.00) payable on May 10th, 1909, together with interest thereon at the rate of five per cent (5%) per annum, and on said Fifteenth day of February, 1909, Mr. Whitelaw is also to deliver to you a receipt, in my favor, for the sum of Three Thousand One Hundred and Twenty-five (\$3,125.00), being on account of commission at the rate of ten per cent (10%) upon the aggregate sum of Thirty-one Thousand Two Hundred and Fifty Dollars (\$31,250). The Promissory Note which is to be delivered to you is to be drawn in my favor, and is to read substantially as follows:

“\$5625.00. San Francisco, Cal., Jan. 15/1909.

On or before May 10th, 1909, after date, without

grace, for value received, I promise to pay to FRED BEAUDRY, or order at San Francisco, California, the sum of Five Thousand Six Hundred and Twenty Five Dollars (\$5,625.00), in United States Gold Coin; together with interest thereon at the rate of five per cent (5%) per annum, from the Fifteenth day of February, 1909, until paid.

(Signed) GEO. H. WHITELAW."

In other words, on February 1st, 1909, Mr. Whitelaw is to pay to you for my credit the sum of Ten Thousand Dollars (\$10,000.00) and on February 15th, 1909, he is to pay to you the further sum of Twelve Thousand and Five Hundred Dollars (\$12,500.00), and on the said last mentioned date is to deliver to you the Promissory Note and the Receipt for commission above mentioned; the payment of Ten Thousand Dollars (\$10,000) in payment of Twelve Thousand and Five Hundred Dollars (\$12,500), the Promissory Note for Five Thousand Six Hundred and Twenty-five Dollars (\$5,625.00), and the receipt for [77] commission of Three Thousand and One Hundred and Twenty-five Dollars (\$3,125.00), will aggregate the sum of Thirty-one Thousand, Two Hundred and Fifty Dollars (\$31,250), or one-half of the amount of the payment which was due January 10th, 1909.

If Mr. Whitelaw makes the payment of Ten Thousand Dollars (\$10,000) net cash, on February 1st, 1909, you are authorized to receive the sum of Twelve Thousand Five Hundred Dollars (\$12,500) on February 15, 1909, and the Promissory Note and the Receipt for Commission, above named; but if Mr.

Whitelaw fails to make the payment of Ten Thousand Dollars (\$10,000) on February 1st, 1909, then you are not authorized to receive any further payments, or the Promissory Note and Commission Receipt, and are to return the Deed and Agreement to me.

If Mr. Whitelaw shall have paid the Ten Thousand Dollars (\$10,000) on February 1st, 1909, and shall also have paid the Twelve Thousand Five Hundred Dollars (\$12,500) due on February 15th, 1909, and also shall have delivered to you the Promissory note and the Commission Receipt above mentioned; then, and in that event you are further authorized to receive from the said George H. Whitelaw, at any time on or before July 1st, 1909, the further sum of Thirty-one Thousand, Two Hundred and Fifty Dollars (\$31,250), together with interest thereon at the rate of five per cent (5%) per annum, from January 10, 1909, until paid.

All of the payments of money hereinbefore mentioned are absolutely without grace, and must be paid on or before the dates mentioned, in United States Gold Coin.

These arrangements have been made between myself and Mr. Whitelaw relative to the payment which was due on January 10th, 1909, and amounting to the sum of Sixty-two Thousand and Five Hundred Dollars (\$62,500.00). In all other respects, the Agreement, dated July 21st, 1906, between Mr. Whitelaw and myself is to remain in full force, operation and effect, and these supplemental instructions are in no wise to alter the general terms and conditions

thereof; but these instructions are simply to apply to the matter of the payment which was due on January 10th, 1909.

I, heretofore, and on December 21st, 1908, sent you instructions relating to the payment which would fall due on January 10th, 1909, but such instructions you are to disregard and return to me.

Mr. Geo. H. Whitelaw has hereon consented to the terms, stipulations, payments and conditions hereinabove set forth.

Very respectfully,

(Sgd.) FRED BEAUDRY.

I, Geo. H. Whitelaw, being the same Geo. H. Whitelaw referred to in the agreement, dated July 21st, 1906, and the Deed dated October 31st, 1906, between Fred Beaudry and Geo. H. Whitelaw, and on deposit in escrow with the Pioneer Trust Company of Kansas City, Mo., subject to certain escrow instructions, do [78] hereby acknowledge and declare that the above and foregoing letter to Pioneer Trust Company of Kansas City, Mo., is a true and correct statement of the terms and conditions relating to the payment of the sum of Sixty-two Thousand and Five Hundred Dollars (\$62,500), which was due Fred Beaudry on January 10th, 1909, and I hereby agree and consent to the terms and stipulations contained in this letter, and agree to be bound thereby.

Dated San Francisco, Cal., Jan. 15th, 1909.

(Signed) GEO. H. WHITELOW. [79]

EXHIBIT "E."

THIS AGREEMENT, made and entered into this

eleventh day of December, in the year of our Lord,
One Thousand Nine Hundred and Nine,

Between FRED BEAUDRY, of the City and
County of San Francisco, State of California, the
party of the first part, and—

GEORGE H. WHITELOW, of Delta, State of
California, the party of the second part,

WITNESSETH: THAT WHEREAS, on the
twenty-first day of July, A. D. 1906, the said Fred
Beaudry did enter into a written contract with the
said George H. Whitelaw for the sale of certain
Gravel Mines, together with the timber and improve-
ments thereon, and fixtures and personal property,
including pipes, flumes, ditches, saw-mill, block-mill,
giants, tools, buildings, furniture and water-rights,
all located in Township Thirty-five (35) North of
Range Eight (8) West, M. D. B. & M., in the County
of Trinity, State of California;

AND WHEREAS, said Contract or Agreement
particularly provided for the sale of said properties
at the price or sum of Two Hundred and Fifty Thou-
sand Dollars (\$250,000.00) in United States Gold
Coin;

AND WHEREAS, from time to time extensions
in the time for the payment of purchase price have
been made;

AND WHEREAS, the sum of One Hundred and
Twenty-five Thousand (\$125,000.00) Dollars in
United States Gold Coin has been paid for and on
account of purchase price of the above-named and
described property;

AND WHEREAS, under the terms of the said

agreement of July 21st, 1906, and under the terms of the several extensions of time for the payment of purchase price, there becomes due on the Tenth day of January, 1910, the sum of Sixty-two Thousand and Five Hundred Dollars (\$62,500.00), in United States Gold Coin, together with interest on the sum of One Hundred and Twenty-five Thousand Dollars (\$125,000.00) from the tenth day of January, 1909, at the rate of five per cent. (5%) per annum, making a total payment due on the tenth day of January, 1910, of the sum of Sixty-eight Thousand Seven Hundred and Fifty Dollars (\$68,750.00), in United States Gold Coin; [80]

AND WHEREAS, the said party of the second part believes that he will be unable to make the said payment on the tenth day of January, 1910, in the sum of sixty-eight thousand, seven hundred and fifty (\$68,750.00) dollars;

AND WHEREAS, the said party of the second part considers that he will be unable to make the payment due on the tenth day of January, 1911, in the sum of sixty-two thousand, five hundred dollars (\$62,500.00);

AND WHEREAS, there still remains due, owing and unpaid from the party of the second part to the party of the first part, upon the purchase price of said properties, the sum of One Hundred and Twenty-five Thousand Dollars (\$125,000.00), in Gold Coin of the United States, together with interest on said sum at the rate of five per cent. (5%) per annum from the tenth day of January, 1909;

AND WHEREAS, the said party of the second part desires to have the said payments of purchase

price and the time for the making thereof changed and modified, and the said party of the first part is willing to concede and grant to the party of the second part an extension of time within which to make said payments and to alter the terms of payment according to the desires of the party of the second part;

NOW, THEREFORE, the said party of the first part in consideration of the premises, and in consideration of the sum of one (\$1.00) Dollar, lawful money of the United States of America, to him in hand paid by the said party of the second part the receipt whereof is hereby acknowledged, does hereby extend, alter and change the terms and conditions of said Contract and Agreement of July 21st, 1906, in the following respects, ways and forms, to wit:

The installment of purchase price and interest, amounting to the sum of Sixty-eight Thousand, Seven Hundred and Fifty Dollars (\$68,750.00) which is due on the tenth day of January, 1910, under the terms and conditions of the said contract, dated July 21st, 1906, is to be modified and the payment thereof to be made as follows:

The sum of Two Thousand Dollars (\$2,000.00) on the twentieth day of January, 1910;

The sum of Four Thousand Two Hundred and Fifty Dollars (\$4,250.00) on the twentieth day of February, 1910;

The sum of Ten Thousand Dollars (\$10,000.00) on the tenth day of April, 1910, together with the further and additional sum of Two Thousand Two Hundred and Ninety-five [81] Dollars (\$2,295.00) which latter sum shall be paid on said tenth day of

April, 1910 to Thomas B. Dozier, Esq., of 1103 First National Bank Bldg., San Francisco, California, for and as attorney fee and compensation in connection with this matter; this in lieu of any claim which the party of the first part now has against the party of the second party for disbursements actually made and paid out by the said party of the first part up to the date hereof, and not repaid by the party of the second part, in connection with the Contests of Mining Claims and Locations (the subject of the Contract of July 21st, 1906) in the United States Land Office, at Redding, California;

The sum of Ten Thousand Dollars (\$10,000.00) on the tenth day of July, 1910;

The sum of Ten Thousand Dollars (\$10,000.00) on the tenth day of October, 1910;

The sum of Ten Thousand Dollars (\$10,000.00) on the tenth day of November, 1910;

The sum of Twelve Thousand, Five Hundred Dollars (\$12,500.00) on the tenth day of December, 1910; and

The sum of Ten Thousand Dollars (\$10,000.00) on the first day of April, 1911, together with interest thereon at the rate of eight per cent. (8%) per annum, from January 10th, 1910 until paid.

If the payments due on January 20th, 1910, February 20th, 1910, April 10th, 1910, July 10th, 1910, October 10th, 1910, November 10th, 1910 and December 10th, 1910, and the payment due to Thomas B. Dozier on April 10th, 1910, shall actually be made on or before the several dates specified for the making thereof; then the same shall be free and clear

of all interest, otherwise, the said payments and each of them shall bear interest at the rate of five per cent (5%) per annum, from the tenth day of January 1910, until paid.

The installment of purchase price which is due on the tenth day of January, 1911, under the terms and provisions of the contract of July 21st, 1906, is to be paid as follows:

The sum of Ten Thousand Dollars (\$10,000.00) on the tenth day of January, 1911, together with interest thereon at the rate of five per cent. (5%) per annum, from the tenth day of January, 1910, until paid; and the sum of Fifty-two Thousand and Five Hundred Dollars (\$52,500.00) on the tenth [82] day of April, 1911, together with interest on said sum at the rate of five per cent. (5%) per annum, from the tenth day of January, 1910, until the tenth day of January, 1911, at which last mentioned time the said interest on said sum shall be paid; and thereafter and from the said tenth day of January, 1911, until the tenth day of April, 1911, the said sum of Fifty-two Thousand and Five Hundred Dollars (\$52,500.00) shall bear interest at the rate of eight per cent. (8%) per annum, payable on the tenth day of April, 1911.

IT IS FURTHER PROVIDED that the party of the second part shall pay to the party of the first part the further sum of Seven Hundred Dollars (\$700.00) on the tenth day of October, 1910, for money advanced by the party of the first part in the matter of securing of Patents in the Long Gulch

Placer Mining Claim and the Mule Creek Ridge Placer Mining Claim.

IT IS FURTHER STIPULATED AND AGREED that the provisions of the contract of July 21st, 1906, for the removing of the deed of said property from escrow, after the payment of one-half of the purchase price, and the giving of notes secured by mortgage upon the property, is hereby canceled, eliminated, annulled and set aside; and the said party of the second part hereby waives any and all right to remove said deed of escrow until the full and entire purchase price has been paid and all other moneys due from the party of the second part to the party of the first part in connection with this transaction have been fully and completely paid.

IT IS FURTHER STIPULATED AND AGREED, that the party of the second part is to pay all expenses, fees, charges and costs in connection with the Contests in the United States Land Office at Redding, California, and upon any appeal of the same to the Commissioner of the General Land Office, or the Secretary of the Interior, in the Matter of the Application for Patent in the Greenhorn Placer Mining Claims; said Contests being now pending in the United States Land Office, at Redding, California;

AND IT IS FURTHER STIPULATED that the party of the second part is to do and perform on each, every and all of the unpatented placer mining claims, mentioned and particularly set forth in the Contract of Agreement of July 21st, 1906, the annual assessment work, labor and improvements, re-

quired by law, and the rules and regulations of the Department of [83] the Interior, to be done and performed upon placer mining claims in order to hold and maintain the possessory right and title thereto; said labor and improvements to be furnished, done and performed, at the sole cost, charge and expense of the party of the second part, and without any charge, cost or expense to the party of the first part.

IT IS FURTHER STIPULATED AND AGREED that time be and the same is hereby declared to be of the essence and material substance of this Agreement, and of the Agreement of July 21st, 1906, and every part and portion thereof, and is to apply to and bind each and both of the parties hereto, and the heirs, executors, administrators, successors and assigns of the respective parties; and in case of a default in the payment of any of the amounts herein specified to be paid, then the said party of the second part is to forfeit all rights hereunder, both in law and in equity, and the moneys paid for and on account of purchase price and otherwise are to be retained by the party of the first part and are to be considered for and as rental for the use and occupation of said lands and premises.

The Agreement of July 21st, 1906, except as herein changed and expressly modified is to remain in full force, virtue and effect.

A copy of this agreement is to be placed with The Pioneer Trust Company of Kansas City, Missouri, the present escrow dispensary in this matter, and the said Pioneer Trust Company of Kansas City, Missouri, is hereby authorized and empowered to

abide by the terms, stipulations and conditions of this agreement, taken in connection with the instructions heretofore given it in the above matter.

IN WITNESS WHEREOF the said party of the first part has hereunto set his hand and seal the day and year in this instrument first above written.

FRED BEAUDRY. (Seal)

I, George H. Whitelaw, of Delta, Colorado, a party to the agreement of July 21st, 1906, mentioned and referred to herein, do hereby expressly agree and consent to the modifications of the terms and conditions hereinabove set forth and declared of the said agreement of July 21st, 1906, and agree to abide by the terms, stipulations and conditions herein contained.

IN WITNESS WHEREOF, I have hereunto set my hand and seal, this eleventh day of December, in the year of our Lord, One Thousand Nine Hundred and Nine.

GEORGE H. WHITELOW. (Seal) [84]

EXHIBIT "F."

Dec. 11, 1911.

Mr. George H. Whitelaw,
514 Higgins Bldg.,
Los Angeles, Cal.

Dear Mr. Whitelaw:

This is intended as a formal notice to you that I do not intend to allow the contract between you and myself, concerning Minersville mining property in Trinity County, California, to remain unsettled and unfulfilled upon your part after the first day of January, 1912. I have repeatedly given you exten-

sions of time within which to make payments for and on accounts of purchase price of the properties, and the matter has now run into years. I must now demand that the matter be closed and that I be paid as per the terms and conditions of the existing contract and agreement. The exact amount of money which will be due to me on the first day of Jan., 1912, under the terms of the contract and agreements, is \$81,969.95, plus the sum of \$237.10 paid out by me for taxes of this present year. This includes the entire amount of principal and interest due and the amount of taxes disbursed, and makes a total of \$82,207.05. I need the money and desire to have it paid, but will make this last and final proposition, to wit:

If the sum of \$32,207.05 is paid to me, or to my account at the Pioneer Trust Company in Kansas City, Missouri, on or before the first day of January, 1912, without rebate or discount in cash, Gold Coin of the United States, I will permit the amount or balance of \$50,000.00 to remain unpaid for the Period of one year from the first day of January, 1912; the said amount to draw interest at the rate of 8%, eight per cent, per annum, and interest to be paid semi-annually.

If this proposition is not accepted and the sum of \$32,207.05 paid on or before the first day of January, 1912, or the full amount which is due paid on or before said date, then I will declare the forfeiture of the contract and agreement, will grant no further extension of time and will recall the papers from the Pioneer Trust Company at Kansas City, Missouri.

I will not permit the matter to remain in the uncertain and unsatisfactory state which it has been in for some time past.

Respectfully,

(Signed) FRED BEAUDRY. [85]

**Exhibit "B" [to First Amended Bill of Complaint—
Affidavit of Charles W. Willard.]**

IN WITNESS WHEREOF, the said The Trinity Gold Dredging & Hydraulic Company has caused this claim to be executed by its attorneys this 28th day of January, 1913.

THE TRINITY GOLD DREDGING &
HYDRAULIC COMPANY,

By McCUTCHEN, OLNEY & WILLARD,

Its Attorneys.

State of California,

City and County of San Francisco,—ss.

Charles W. Willard, being first duly sworn, deposes and says:

That he is a member of the firm of McCutchen, Olney & Willard, attorneys at law; that the said firm and affiant are attorneys for The Trinity Gold Dredging & Hydraulic Company, the corporation named as claimant in the foregoing claim; that all the members of the said firm and affiant have their offices in the City and County of San Francisco, State of California; that the said claimant, The Trinity Gold Dredging & Hydraulic Company, is a corporation organized under the laws of the State (formerly Territory) of Arizona, with its principal office at Tucson, in said State, and having an office for the transaction of its corporate business in Minne-

apolis, in the State of Minnesota; that all the officers of said corporation reside out of and are absent from the [86] said State of California, and the City and County of San Francisco, in said State; that affiant makes this affidavit on behalf of the said claimant, and this affidavit is not made by the said claimant or by any officer of said claimant, for the reason, as aforesaid, that the said claimant is a corporation, and that the said corporation and all the officers thereof are absent from the City and County and State where affiant and the other attorneys for the said claimant have their offices; that affiant makes this affidavit on behalf of said claimant for the reasons hereinbefore set forth, and for the further reason that the facts constituting the said claim are within the knowledge of affiant; that affiant has read the foregoing statement of claim and knows the contents thereof, and that the same is true; that the amount of said claim, as set forth in said statement, to wit, the sum of \$304,169, with interest thereon at the rate of 7% per annum from the 31st day of December, 1912, is justly due; that no payments have been made on the amount of said claim which are not credited and that there are no offsets to the same to the knowledge of affiant.

Affiant further states that Exhibits "A," "B," "C," "D," "E," and "F," attached to the said claim, are copies of the instruments upon which the said claim is founded, and that the original instruments, of which the said exhibits are copies, cannot now be found among the papers of the said claimant. The Trinity Gold Dredging & Hydraulic Company,

nor anywhere, and that the same, [87] and each of them, are either lost or destroyed.

CHARLES W. WILLARD.

Subscribed and sworn to before me this 28th day of January, 1913.

[Seal]

FRANK L. OWEN,
Notary Public in and for the City and County of
San Francisco, State of California.

Service of the within first amended bill of complaint and receipt of a copy is hereby admitted this 13th day of January, 1914.

THOMAS B. DOZIER,
Solicitors for Defendants, Angele Beaudry, Executrix, etc., and Angele Beaudry.

[Endorsed]: Filed Jan. 13, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [88]

In the District Court of the United States, Northern District of California, Second Division.

No. 20.

THE TRINITY GOLD DREDGING AND HYDRAULIC COMPANY, a Corporation,
Complainant,

vs.

ANGELE BEAUDRY, as Executrix of the Last Will and Testament of FREDERIC BEAUDRY, Deceased, ANGELE BEAUDRY, Individually, and GEORGE H. WHITELAW, Defendants.

Motion to Dismiss First Amended Bill of Complaint.

To the Honorable Judges of the United States District Court, in and for the Northern District of California:

The defendants, Angele Beaudry as executrix of the Last Will and Testament of Frederic Beaudry, deceased; and Angele Beaudry, individually; hereby appear in response to complainant's First Amended Bill of Complaint, filed and served in the above-entitled action, and move to dismiss the said First Amended Bill of Complaint, filed and presented herein by the Complainant, The Trinity Gold Dredging and Hydraulic Company, a corporation; the grounds upon which said motion is based and is to be made are as follows:

I.

That the First Amended Bill of Complaint does not state facts sufficient to entitle the Complainant to the equitable relief prayed for by it; and does not state facts [89] sufficient to constitute a valid cause of action in equity; and neither does said First Amended Bill of Complaint state sufficient facts to entitle it to any equitable relief whatever.

II.

That it affirmatively appears from the facts set forth and stated in the First Amended Bill of Complaint that the complainant is not entitled to the equitable relief prayed for by it and is not entitled to any equitable relief whatever.

III.

That it affirmatively appears upon the face of the

First Amended Bill of Complaint and from the facts therein stated, that complainant is not entitled to rescind the contract therein referred to, because it has not used reasonable, or any, diligence to rescind promptly upon discovering the alleged facts which it is claimed entitle it to rescind; it not being claimed or alleged that complainant was not at all times mentioned in the said First Amended Bill of Complaint, free from duress, menace, undue influence and disability; nor that it was not aware of its right to rescind before a long time prior to any attempt or effect to do so.

IV.

That it affirmatively appears from the face of the First Amended Bill of Complaint, and from the facts therein stated, that the complainant is not entitled to rescind the contract therein referred to because it has [90] not offered to restore the property received by it, under said contract, and cannot restore the same; and these defendants cannot be restored to substantially the same position that they would have been in had the contract not been made.

V.

That it affirmatively appears from the face of said First Amended Bill of Complaint, and from the facts therein stated, that the complainant cannot restore the defendants to the condition in which they would have been in but for the contract; and it does affirmatively appear from the face of the said First Amended Bill of Complaint, and from the facts therein stated, that the complainants cannot restore

the defendants, or either of them, to the position they would have occupied but for the contract.

VI.

That it affirmatively appears that the defendant, Angele Beaudry, in her individual capacity, is neither party nor privy to any of the transactions mentioned in the said First Amended Bill of Complaint; it affirmatively appearing that the property has not yet been distributed to her as an individual, but is yet in the hands of the executrix, and under the jurisdiction of the Superior Court of the State of California, in and for the City and County of San Francisco, and if there is any action at all, it is to enforce rights or liens against the property of Frederic Beaudry, deceased, and against his executrix.

[91]

WHEREFORE, these defendants pray the Honorable Court hearing this motion that, by its order, judgment and decree, it dismiss and discharge the complainant's First Amended Bill of Complaint, and send these defendants hence with their costs and disbursements.

Dated: January 16th, 1914.

THOMAS B. DOZIER,

Solicitor for the Defendants, Angele Beaudry, as
Executrix of the Last Will and Testament of
Frederic Beaudry, Deceased; and Angele Beau-
dry, Individually.

Service of the within Motion, etc., admitted by
receipt of copy this 16th day of January, 1914.

McCUTCHEN, OLNEY & WILLARD,

Solicitors for Complainant.

[Endorsed]: Filed Jan. 16, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [92]

At a stated term, to wit, the March term, A. D. 1914,
of the District Court of the United States of
America, in and for the Northern District of
California, Second Division, held at the court-
room in the City and County of San Francisco,
on Monday, the 8th day of June, in the year of
our Lord one thousand nine hundred and four-
teen. Present: The Honorable WILLIAM C.
VAN FLEET, District Judge.

No. 20—EQUITY.

TRINITY GOLD DREDGING & HYDRAULIC
CO.

vs.

ANGELE BEAUDRY, etc., et al.

**Order Granting Motion to Dismiss Amended Bill of
Complaint.**

Defendants' motion to dismiss the amended bill
of complaint, heretofore heard and submitted, being
now fully considered and the Court having rendered
its oral opinion thereon, it was ordered that said
motion to dismiss the amended bill be and the same is
hereby granted. [93]

*In the United States District Court, in and for the
Northern District of California, Second Division.*

No. 20.

THE TRINITY GOLD DREDGING AND HY-
DRAULIC COMPANY, a Corporation,
Complainant,

vs.

ANGELE BEAUDRY, as Executrix of the Last
Will and Testament of FREDERIC BEAU-
DRY, Deceased, ANGELE BEAUDRY, In-
dividually, and GEORGE H. WHITELAW,
Defendants.

Decree.

In the above-entitled action, the motion of the defendants, Angele Beaudry, as Executrix of the last Will and Testament of Frederic Beaudry, deceased, and Angele Beaudry, individually, to dismiss the First Amended Bill of Complaint of the complainant in said action, having, by an Order duly and regularly made and entered on Monday, the eighth day of June, A. D. 1914, been granted herein, and said First Amended Bill of Complaint dismissed; and no application, or notice of motion, for leave to file a Second Amended Bill of Complaint herein, having been made by said complainant within the time allowed by law and the rules of this Court, and more than ten days having elapsed since the entry of said Order Dismissing the First Amended Bill of Complaint and since service of written notice of the entry of said Order,—

Now, on motion of Thomas B. Dozier, Esq., solicitor for the defendants, Angele Beaudry, as Executrix of the Last Will and Testament of Frederic Beaudry, deceased, and Angele Beaudry, individually, [94] the Court being fully advised in the premises:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the motion to dismiss the First Amended Bill of Complaint be, and is hereby granted; that the said First Amended Bill of Complaint be, and is hereby dismissed; that the said action be, and is hereby dismissed, that the complainant take nothing thereby, and that the defendants, Angele Beaudry, as Executrix of the Last Will and Testament of Frederic Beaudry, deceased, and Angele Beaudry, individually, have judgment against the said complainant, The Trinity Gold Dredging and Hydraulic Company, a corporation, for their costs incurred herein, amounting to the sum of ——— Dollars.

Done in open court, this 11th day of July, A. D. 1914.

WM. C. VAN FLEET,
District Judge.

[Endorsed]: Filed and entered July 11, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [95]

*In the United States District Court, in and for the
Northern District of California.*

No. 20.

THE TRINITY GOLD DREDGING AND HY-
DRAULIC COMPANY, a Corporation,
Complainant,

vs.

ANGELE BEAUDRY, as Executrix of the Last
Will and Testament of FREDERIC BEAU-
DRY, Deceased, ANGELE BEAUDRY, In-
dividually, and GEORGE H. WHITELAW,
Defendants.

**Proposed Bill of Exceptions of Complainant from
Order Granting Defendants' Motion to Dismiss
First Amended Bill of Complaint.**

BE IT REMEMBERED that within the time
allowed by law and the order of the above-entitled
court, complainant above named filed in said court,
in the above-entitled cause, its first amended bill of
complaint, and served the said first amended com-
plaint upon defendants in the manner required by
law; and, to wit, on the 16th day of January, 1914,
said defendants served upon complainant, and filed
in the above-entitled court, in the above-entitled
action their motion to dismiss. That the said first
amended complaint was in words and figures follow-
ing, to wit:

(Here follows a copy of the first amended bill of
complaint, with all exhibits annexed thereto, which
said first amended bill of complaint and exhibits are

already contained in this transcript, and are for that reason and to avoid useless repetition omitted at this point.) [96]

BE IT FURTHER REMEMBERED that, thereafter, and within the time allowed by law, and, to wit, on the 16th day of January, 1914, the said defendants served upon complainant, and filed in the above-entitled court, in the above-entitled action, their motion to dismiss said first amended bill of complaint. That said motion to dismiss was in the words and figures following, to wit:

(Here follows a copy of the motion to dismiss the first amended bill of complaint, which said motion to dismiss is already contained in this transcript, and is for that reason and to avoid useless repetition omitted at this point.) [97]

BE IT FURTHER REMEMBERED that, thereafter, and, to wit, on the 26th day of January, 1914, at a stated term of the District Court of the United States for the Northern District of California, Second Division, the said motion of said defendants to dismiss said first amended bill of complaint came on regularly for hearing before Honorable William C. Van Fleet, District Judge, presiding; said defendants being represented by Thomas B. Dozier, Esquire, and the complainants being represented by Messrs. McCutchen, Olney & Willard. Thereupon the motion was argued by counsel, and was thereafter submitted to said court for determination. Thereafter, and, to wit, on the 8th day of June, 1914, the said Court having fully considered said motion, did grant the same, and, on said last mentioned date

the following order was given, made and entered by said Court:

(Here follows a copy of the order granting motion to dismiss the amended bill, which said copy of order is already contained in this transcript, and is for that reason and to avoid useless repetition omitted at this point.) [98]

That the following is a copy of the oral opinion delivered by the Judge of said Court upon the decision of said motion to dismiss: [99]

In the District Court of the United States, Northern District of California, Second Division.

Hon. WM. C. VAN FLEET, Judge.

No. 20—EQUITY.

TRINITY GOLD DREDGING AND HY-
DRAULIC COMPANY, a Corporation,
Plaintiff,

vs.

ANGELE BEAUDRY, etc., et al.,
Defendants.

Oral Opinion on Motion to Dismiss Amended Bill of Complaint.

McCUTCHEN, OLNEY & WILLARD, for
Plaintiff.

THOMAS B. DOZIER, for Defendants.

MONDAY, JUNE 8th, 1914.

The COURT (Orally): In the case of Trinity Gold Dredging and Hydraulic Company, a corporation, vs. Angele Beaudry, a bill filed here for rescission of a

contract for the sale of certain mining property, the original bill was dismissed for want of equity and because of laches. Plaintiff sought and obtained leave to file an amended bill, which is again met by a motion to dismiss on the same grounds. After a very careful examination I am satisfied that the amended bill is not improved in any material respect over the original. The contract is in the form of an option [100] giving a right to purchase within a given time, with the right to the immediate possession of the property for the purposes of exploration and exploitation. The option was accepted and all but the last payment has been made. The property is described as consisting of a number of mining claims embracing a considerable acreage of placer ground, something in excess of 1200 acres being patented, and thus described in the contract; some eight claims as held under Receiver's Certificate, and five, I think, or seven, are described as merely possessory claims. Now, this property is thus specifically described in the contract, with the title then held by the party giving the option. He stipulates, in the event the option is availed of, upon demand, to make "a good and sufficient deed of all of the properties aforesaid, free and clear of encumbrances." The bill proceeds upon the theory that the plaintiff is entitled to a rescission for the failure of the defendant to make title, the failure alleged relating to certain of the unpatented claims. As indicated at the argument, I think that the bill proceeds upon a fundamental misconstruction of the effect of this contract. It is perfectly true, as plaintiff insists, that under an ordinary

contract for the sale of real estate a covenant to give a good deed implies, in the absence of any limitation, the requirement of a conveyance of a perfect title; but that rule cannot in its nature have application to an instance such as this, where the contract specifically describes the character of right or title held at the date of the contract, where there is no provision requiring the taking of any further steps by the grantor to [101] acquire a different and further title, and where, as here, the situation is such that under the very terms of the contract the grantor is depriving himself of the ability to perfect the title to the unpatented claims. Under such circumstances it seems to me that the contract must be construed as one contemplating a transfer only of the title as it then stood, the interest or right described as existing in the grantor, and not one to be interpreted as an ordinary contract for the conveyance of real estate. The property is nowhere described as real estate. It is described, as I have said, as certain mining property, and giving a specific designation of the particular claims and how they are held. The fact, if it were material to regard it, that subsequent to the making of the original contract, when the Government was giving the plaintiff trouble over some of the claims, the parties entered into a supplemental contract whereby, in consideration of the grantor taking certain steps regarded as necessary to meet the objections of the Government, it was provided that the grantee should pay all the expenses of the proceedings, seems to me was in effect a construction of the contract by the parties themselves in harmony with

the view I have expressed. The right to rescission depending upon this feature of the contract, the bill is, I am satisfied, based upon a misapprehension of its effect, and fails to state a cause for equitable relief.

As indicated, I am also of the opinion that the bill has not avoided the objection of laches. It is perhaps unnecessary to definitely pass upon that question. [102] Laches does not necessarily depend upon any specific lapse of time. It is a neglect which under the circumstances of the particular case is such as makes it inequitable to permit one to prosecute a right which under other circumstances he might be justly entitled to enforce. Looking at all the circumstances, it seems to me to be apparent that after plaintiff had become aware of all the grounds for rescission which it sets up in the bill, it delayed for an unreasonable period before asserting them, and although that period was comparatively brief, I am nevertheless of the opinion that it constituted culpable laches.

The motion to dismiss the amended bill will be granted. [103]

That, thereafter, and, to wit, on the 17th day of June, 1914, the Judge of said court duly gave and made an order extending the time of complainant twenty (20) days from the date of said order to prepare, serve and file, and present for settlement its proposed bill of exceptions on the order theretofore given and made by the Court granting the motion of defendants to dismiss the first amended bill of complaint.

The foregoing constitute all of the proceedings had

upon the hearing and determination of said motion to dismiss said first amended bill of *complainant*.

And now within the time required by law and the rules of this court, the said complainant proposes the foregoing as and for its bill of exceptions, and prays that the same may be settled and allowed as correct.

Dated: San Francisco, California, June 30th, 1914.

McCUTCHEN, OLNEY & WILLARD,

Attorneys for Complainant. [104]

IT IS HEREBY STIPULATED that the foregoing bill of exceptions is correct, and that it contains all of the proceedings had upon the hearing and determination of the motion of the defendants herein, Angele Beaudry, as executrix of the last will and testament of Frederic Beaudry, deceased, and Angele Beaudry, individually, to dismiss complainant's first amended bill of complaint; and it is stipulated that the said proposed bill of exceptions may be allowed and approved.

Dated, July 10th, 1914.

THOMAS B. DOZIER,

Attorney for Defendants Angele Beaudry, as Executrix of the Last Will and Testament of Frederic Beaudry, Deceased, and Angele Beaudry, Individually.

McCUTCHEN, OLNEY & WILLARD,

Attorneys for Complainant.

The foregoing bill of exceptions being now presented in due time and found to be correct, I do hereby certify that the said bill is a true bill of exceptions, and that it contains all of the proceedings upon the hearing and determination of the motion of defend-

ants herein, Angele Beaudry, as executrix of the last will and testament of Frederic Beaudry, deceased, and Angele Beaudry, individually, to dismiss complainant's first amended bill of complaint, and the said bill of exceptions is hereby settled, allowed and approved.

Dated, July 11th, 1914.

WM. C. VAN FLEET,
United States District Judge for the Northern District of California, Second Division.

[Endorsed]: Filed Jul. 11, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [105]

*In the United States District Court, in and for the
Northern District of California.*

No. 20.

THE TRINITY GOLD DREDGING & HYDRAU-
LIC COMPANY, a Corporation,

Complainant,

vs.

ANGELE BEAUDRY, as Executrix of the Last
Will and Testament of FREDERIC BEAU-
DRY, Deceased, ANGELE BEAUDRY, Indi-
vidually, and GEORGE H. WHITELAW,
Defendants.

Stipulation Consenting to the Use of Bill of Exceptions on Order Granting Defendants' Motion to Dismiss First Amended Bill of Complaint as and for a Bill of Exceptions Upon Appeal from Judgment.

WHEREAS, on the 8th day of June, 1914, the

above-entitled court in the above-entitled matter gave and made and entered an order granting the motion of defendants herein, Angele Beaudry, as executrix of the last will and testament of Frederic Beaudry, deceased, and Angele Beaudry, individually, to dismiss complainant's first amended bill of complaint; and,

WHEREAS, thereafter complainant duly presented, in the manner and within the time required by law and the rules of this court, a bill of exceptions from said order granting said motion, as aforesaid, and said bill of exceptions was, on the 11th day of July, 1914, duly allowed, approved and settled in the manner required by law and the rules of this court, and filed in the office of the clerk of said court in the above-entitled [106] cause; and,

WHEREAS, thereafter, and, to wit, on the 11th day of July, 1914, the above-entitled court gave and made and entered its judgment in favor of said defendants, Angele Beaudry, as executrix of the last will and testament of Frederic Beaudry, deceased, and Angele Beaudry, individually, pursuant to said order granting said defendants' motion to dismiss said first amended bill, as aforesaid, and said complainant is about to appeal to the Circuit Court of Appeals for the Ninth Circuit from said last mentioned judgment:

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the said bill of exceptions of complainant from said order granting said motion to dismiss said first amended bill of com-

plaint, heretofore settled, allowed, approved and filed, as aforesaid, may be used by said complainant upon its said proposed appeal from the judgment in this cause; and it is further stipulated that said last mentioned bill of exceptions shall, in all respects, be deemed to take the place of a separate bill of exceptions from the said judgment; and said defendants, Angele Beaudry, as executrix of the last will and testament of Frederic Beaudry, deceased, and Angele Beaudry, individually, hereby waive all objection to the use of said bill of exceptions from said order granting said motion to dismiss as and for a bill of exceptions upon appeal from the said judgment.

Dated: July 11th, 1914.

THOMAS B. DOZIER,
Attorney for Defendants, Angele Beaudry, as Execu-
trix of the Last Will and Testament of Frederic
Beaudry, Deceased, and Angele Beaudry, Indi-
vidually. [107]

GOOD CAUSE appearing therefor, and upon the foregoing stipulation—

IT IS HEREBY ORDERED that the bill of exceptions of complainant from the order heretofore given and made by this Court granting the motion of the defendants herein, Angele Beaudry, as executrix of the last will and testament of Frederic Beaudry, deceased, and Angele Beaudry, individually, to dismiss complainant's first amended bill of complaint, heretofore, settled, allowed, approved and filed, may be used by said complainant upon its appeal from the judgment heretofore given and made by this Court in this cause; and it is further ordered

that said last mentioned bill of exceptions shall in all respects be deemed to take the place of a separate bill of exceptions from said judgment.

Dated, July 11th, 1914.

WM. C. VAN FLEET,
United States District Judge for the Northern District of California, Second Division.

[Endorsed]: Filed Jul. 11, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [108]

In the United States District Court, in and for the Northern District of California, Second Division.

No. 20.

THE TRINITY GOLD DREDGING AND HYDRAULIC COMPANY, a Corporation,
Complainant,

vs.

ANGELE BEAUDRY, as Executrix of the Last Will and Testament of FREDERIC BEAUDRY, Deceased, ANGELE BEAUDRY, Individually, and GEORGE H. WHITELAW,
Defendants.

Summons in Severance.

To George H. Whitelaw, Esq.

YOU ARE HEREBY INVITED to join with the undersigned to prosecute an appeal in the above-entitled cause in the United States District Court, Northern District of California, to the United States Circuit Court of Appeals, for the Ninth Circuit, to

reverse the judgment and decree in the above-entitled cause, given, made and entered against you and the undersigned on the 11th day of July, 1914, wherein and whereby it was ordered and decreed that the motion of the defendants above named, Angele Beaudry, as executrix of the last will and testament of Frederic Beaudry, deceased, and Angele Beaudry, individually, to dismiss the first amended bill of complaint of complainant above named be, and the same thereby was granted, and that the said first [109] amended bill of complaint be, and the same thereby was, dismissed, and that the said action be, and the same thereby was, dismissed, and that the complainant herein take nothing thereby, and that the said defendants, Angele Beaudry, as executrix of the last will and testament of Frederic Beaudry, deceased, and Angele Beaudry, individually, have judgment against the said complainant for their costs of suit; or you will be deemed to have acquiesced in the said judgment and decree, and the undersigned shall prosecute said appeal without joining you as a party.

Dated: July 22, 1914.

THE TRINITY GOLD DREDGING AND
HYDRAULIC COMPANY, a Corpora-
tion,

Complainant,
By McCUTCHEN, OLNEY & WILLARD,
Its Solicitors.

Service of the within Summons in Severance and receipt of a copy is hereby admitted this 30th day of July, 1914.

GEORGE H. WHITELAW,

By D. G. WHITELAW,

His Attorney.

GEORGE H. WHITELAW.

[Endorsed]: Filed Sep. 4, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [110]

*In the United States District Court, in and for the
Northern District of California, Second Division.*

No. 20.

THE TRINITY GOLD DREDGING AND
HYDRAULIC COMPANY, a Corporation,
Complainant,

vs.

ANGELE BEAUDRY, as Executrix of the Last
Will and Testament of FREDERIC
BEAUDRY, Deceased, ANGELE BEAU-
DRY, Individually, and GEORGE H.
WHITELAW,

Defendants.

Refusal of George H. Whitelaw to Join in Appeal.

Now, comes George H. Whitelaw, one of the defendants above named, and refuses to join with The Trinity Gold Dredging and Hydraulic Company, a corporation, in prosecuting an appeal from the United States District Court, for the Northern District of California, to the United States Circuit

Court of Appeals, for the Ninth Circuit, as invited in a summons in severance heretofore and, to wit, on the 30th day of July, 1914, served on him, to reverse the judgment and decree in the above-entitled cause given, made and entered against the said The Trinity Gold Dredging and Hydraulic Company, a corporation, and himself, on the 11th day of July, 1914.

GEORGE H. WHITELOW,

D. G. WHITELOW,

His Attorney.

[Endorsed]: Filed Sep. 4, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [111]

In the United States District Court, in and for the Northern District of California, Second Division.

No. 20.

THE TRINITY GOLD DREDGING AND
HYDRAULIC COMPANY, a Corporation,
Complainant,

vs.

ANGELE BEAUDRY, as Executrix of the Last
Will and Testament of FREDERIC
BEAUDRY, Deceased, ANGELE BEAU-
DRY, Individually, and GEORGE H.
WHITELOW,

Defendants.

Petition for Appeal.

The Trinity Gold Dredging and Hydraulic Company, a corporation, complainant above named, conceiving itself aggrieved by the decree and order

given, made and entered in the above-entitled cause, in the above-entitled court, on the 11th day of July, 1914, wherein and whereby it was ordered and decreed that the motion of the defendants herein, Angele Beaudry, as executrix of the last will and testament of Frederic Beaudry, deceased, and Angele Beaudry, individually, to dismiss the complainant's first amended bill of complaint herein, be, and the same was thereby, granted, and that the said first amended bill of complaint be, and the same was thereby, dismissed, and that the [112] said action be, and the same was thereby, dismissed, and that the said complainant take nothing thereby, and that said defendants, Angele Beaudry, as executrix of the last will and testament of Frederic Beaudry, deceased, and Angele Beaudry, individually, have judgment against said complainant for their costs of suit herein incurred, amounting to the sum of \$23.60, does hereby appeal from said order and decree of said Court to the United States Circuit Court of Appeals for the Ninth Circuit, and does hereby pray that this petition for said appeal and for leave to prosecute said appeal, severed from all interest of the defendant herein, George H. Whitelaw, may be allowed, and that a transcript of the record and proceedings and papers upon which said final order and decree was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit; and now, at the time of filing this petition for appeal, the said appellant files an assignment of errors, setting up separately and particularly each error asserted and intended to be urged in the said United States Circuit

Court of Appeals for the Ninth Circuit.

And said petitioner further prays that an order be made fixing the amount of the bond which this appellant shall give and furnish upon said appeal.

And your petitioner will ever pray.

McCUTCHEN, OLNEY & WILLARD,
Solicitors for Said Complainant.

[Endorsed]: Filed Sep. 4, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [113]

*In the United States District Court, in and for the
Northern District of California, Second Division.*

No. 20.

THE TRINITY GOLD DREDGING AND
HYDRAULIC COMPANY, a Corporation,
Complainant,

vs.

ANGELE BEAUDRY, as Executrix of the Last
Will and Testament of FREDERIC
BEAUDRY, Deceased, ANGELE BEAU-
DRY, Individually, and GEORGE H.
WHITELAW,

Defendants.

Assignment of Errors.

Now, comes the Trinity Gold Dredging and Hydraulic Company, a corporation, complainant herein, by its undersigned solicitors, and says that in the record, proceedings, and decree given, made and entered in this cause on the 11th day of July, 1914, there is a manifest error, and that said complainant has been denied its just rights by the said

order and decree entered by said District Court, and the said complainant hereby assigns and sets out separately and particularly the following errors, viz.:

I.

Said District Court erred in making its order on the 8th day of June, 1914, granting the motion of the said defendants, [114] Angele Beaudry, as executrix of the last will and testament of Frederic Beaudry, deceased, and Angele Beaudry, individually, to dismiss complainant's first amended bill of complaint herein.

II.

Said District Court erred in giving and making its order on the 8th day of June, 1914, granting the motion of the defendant herein, Angele Beaudry, as executrix of the last will and testament of Frederic Beaudry, deceased, to dismiss complainant's first amended bill of complaint herein.

III.

Said District Court erred in giving and making its order on the 8th day of June, 1914, granting the motion of the defendant herein, Angele Beaudry, individually, to dismiss complainant's first amended bill of complaint herein.

IV.

Said District Court erred in giving, making and entering its judgment, order and decree on the 11th day of July, 1914, that the motion of the said defendants, Angele Beaudry, as executrix of the last will and testament of Frederic Beaudry, deceased, and Angele Beaudry, individually, to dismiss complain-

ant's first amended bill of complaint, be, and the same was thereby, granted, and that the said first amended bill of complaint be, and the same was thereby, dismissed, and that the said action be, and the same was thereby, dismissed, and that the complainant take nothing thereby, and that the said defendants, Angele Beaudry, as executrix of the last will and testament of Frederic Beaudry, deceased, and Angele Beaudry, individually, have judgment against the said complainant for their costs herein incurred, amounting to the sum of \$23.60. [115]

V.

Said District Court erred in giving, making and entering its judgment on the 11th day of July, 1914, in favor of said defendants, Angele Beaudry, as executrix of the last will and testament of Frederic Beaudry, deceased, and Angele Beaudry, individually, or in favor of either of said defendants.

VI.

Said District Court erred in dismissing said action and in holding and deciding that the agreement of sale which complainant sought to rescind in said first amended bill of complaint did not call for a valid title to the mining claims therein referred to, but that said agreement of sale called only for a conveyance to said complainant of whatever right, title and interest was owned by Frederic Beaudry, the testator of the defendant, Angele Beaudry.

VII.

Said District Court erred in granting said motion to dismiss and in entering judgment in favor of said defendants, Angele Beaudry, as executrix of

the last will and testament of Frederic Beaudry, deceased, and Angele Beaudry, individually, and in holding and deciding that complainant was not entitled to rescind the agreement of sale referred to and set out in the said first amended bill of complaint.

VIII.

Said District Court erred in dismissing said action and in holding and deciding that complainant's right to rescind the agreement of sale referred to and set out in said first amended bill of complaint was barred by laches. [116]

IX.

Said District Court erred in refusing to hold that complainant was entitled to the relief prayed for in said first amended bill of complaint upon the facts set forth therein.

WHEREFORE, said complainant, The Trinity Gold Dredging and Hydraulic Company, a corporation, prays that the said decree may be reversed, and for such further relief as may be meet in the premises.

Dated, San Francisco, California, September 4th, 1914.

McCUTCHEN, OLNEY & WILLARD,
Solicitors for Complainant.

[Endorsed]: Filed Sep. 4, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [117]

*In the United States District Court, in and for the
Northern District of California, Second Divi-
sion.*

No. 20.

THE TRINITY GOLD DREDGING AND
HYDRAULIC COMPANY, a Corporation,
Complainant,

vs.

ANGELE BEAUDRY, as Executrix of the Last
Will and Testament of FREDERIC
BEAUDRY, Deceased, ANGELE BEAU-
DRY, Individually, and GEORGE H.
WHITELAW,

Defendants.

Order Allowing Appeal and Fixing Amount of Bond.

WHEREAS, in the District Court of the United States, in and for the Northern District of California, on the 11th day of July, 1914, a decree was made and entered in the above-entitled cause, wherein and whereby it was ordered, adjudged and decreed that the motion of the defendants, Angele Beaudry, as executrix of the last will and testament of Frederic Beaudry, deceased, and Angele Beaudry, individually, to dismiss complainant's first amended bill of complaint herein, be, and the same was thereby, granted, and that the said first amended bill of complaint be, and the same was thereby, dismissed, and that the said action be, and the same was thereby, dismissed, and that the complainant take nothing thereby, and that said defendants, Angele

Beaudry, [118] as executrix of the last will and testament of Frederic Beaudry, deceased, and Angele Beaudry, individually, have judgment against said complainant for their costs of suit herein incurred; and

WHEREAS, complainant herein, The Trinity Gold Dredging and Hydraulic Company, a corporation, has on this 4th day of September, 1914, filed its petition for the allowance of an appeal from said decree (severed from all interest of George H. Whitelaw, a party to this action) to the United States Circuit Court of Appeals, Ninth Circuit, together with an assignment of errors, in and by which said petition it has prayed that an order be made fixing the amount of the bond which it shall give and furnish on said appeal;

NOW, THEREFORE, in consideration of the premises, and good cause appearing therefor, IT IS HEREBY ORDERED that said appeal be, and the same is hereby permitted and allowed, and that said appeal may be prosecuted by the said complainant as to its own interest and severed from all interest of said George H. Whitelaw;

IT IS FURTHER ORDERED that the said complainant shall file its undertaking and bond in form and substance conditioned, and with sureties, in accordance with the provisions of the law, and the rules and practice of this Court, in the said United States District Court, for the Northern District of California, in the sum of five hundred (500) dollars, which said bond and sureties thereon shall be approved before filing, and the said amount is hereby fixed as the amount of said bond, said bond

124 *The Trinity Gold Dredging etc. Co.*

to be approved by a Judge of this Court.

Dated, September 4th, 1914.

WM. C. VAN FLEET,
United States District Judge.

[Endorsed]: Filed Sep. 4, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [119]

*In the United States District Court, in and for the
Northern District of California, Second Division.*

No. 20.

THE TRINITY GOLD DREDGING AND
HYDRAULIC COMPANY, a Corporation,
Complainant,

vs.

ANGELE BEAUDRY, as Executrix of the Last
Will and Testament of FREDERIC
BEAUDRY, Deceased, ANGELE BEAU-
DRY, Individually, and GEORGE H.
WHITELAW,

Defendants.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS
that the undersigned, Massachusetts Bonding and
Insurance Company, a corporation created, organ-
ized and existing under and by virtue of the laws
of the commonwealth of Massachusetts, and duly
authorized to transact business in the State of Cali-
fornia, and fully qualified before the Department of
Justice to execute bonds and undertakings in any
and all Federal Courts of the United States of

America, is held and firmly bound unto the defendants herein, Angele Beaudry, as executrix of the last will and testament of Frederic Beaudry, deceased, and Angele Beaudry, individually, in the full and just sum of five hundred (500) dollars, to be paid to said defendants, and their, and each of their, successors and assigns, to which payment, well and truly to be made, the undersigned binds itself, and its successors by these presents.

SEALED with our seals and dated this 4th day of September, [120] 1914.

WHEREAS, lately, at a session of the District Court of the United States, for the Northern District of California, in a suit pending in said Court between The Trinity Gold Dredging and Hydraulic Company, a corporation, plaintiff, and Angele Beaudry, as executrix of the last will and testament of Frederic Beaudry, deceased, Angele Beaudry, individually, and George H. Whitelaw, defendants, a decree was rendered against said complainant, The Trinity Gold Dredging and Hydraulic Company, a corporation, and the said complainant having obtained from said Court its order allowing it to appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, in the aforesaid suit, and a citation directed to the said defendants, Angele Beaudry, as executrix of the last will and testament of Frederic Beaudry, deceased, and Angele Beaudry, individually, and to each of them, citing and admonishing them, and each of them, to appear at the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at San Francisco, in the

State of California, on or before the 3rd day of October, 1914;

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH: That if the said complainant, The Trinity Gold Dredging and Hydraulic Company, a corporation, shall prosecute its appeal to effect, and answer all damages and costs that may be awarded against it, if it shall fail to make its plea good, then the obligation to be void; else to remain in full force and effect;

IN WITNESS WHEREOF, MASSACHUSETTS BONDING AND INSURANCE COMPANY, a corporation, has hereunto caused its corporate name [121] to be signed, and attested, and its corporate seal to be affixed, by its duly authorized officers, at San Francisco, California, this 4th day of September, 1914.

MASSACHUSETTS BONDING AND
INSURANCE COMPANY.

By JOHN H. ROBERTSON,
Attorney in Fact.

[Seal]

By JAMES W. MOYLES,
Attorney in Fact.

The foregoing bond is hereby approved this 4th day of September, 1914.

WM. C. VAN FLEET,
U. S. District Judge.

[Endorsed]: Filed Sep. 4, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [122]

*In the United States District Court, in and for the
Northern District of California, Second Division.*

No. 20.

THE TRINITY GOLD DREDGING AND
HYDRAULIC COMPANY, a Corporation,
Complainant,

vs.

ANGELE BEAUDRY, as Executrix of the Last
Will and Testament of FREDERIC BEAU-
DRY, Deceased, ANGELE BEAUDRY, Indi-
vidually, and GEORGE H. WHITELAW,
Defendants.

Praeipce [for Transcript of Record].

The clerk of the above-entitled court will please prepare a transcript of the record for the Appellate Court in the above-entitled cause, and is hereby directed to insert therein the following:

(1) The first amended bill of complaint filed in the above-entitled cause on January 13, 1914.

(2) The motion of the defendants, Angele Beaudry, as executrix of the last will and testament of Frederic Beaudry, deceased, and Angele Beaudry, individually, to dismiss said first amended bill of complaint filed in the above-entitled cause on January 16, 1914. [123]

(3) The order given and made by the District Court of the United States, for the Northern District of California, on the 8th day of June, 1914, granting the motion of said defendants, Angele Beaudry, as executrix of the last will and testament

of Frederic Beaudry, deceased, and Angele Beaudry, individually, to dismiss said first amended bill of complaint.

(4) The opinion rendered by the Judge of the said District Court, the Honorable William C. Van Fleet, on June 8, 1914, on the granting of said last mentioned motion to dismiss.

(5) Complainant's bill of exceptions to said order granting said motion of said defendants, Angele Beaudry, as executrix of the last will and testament of Frederic Beaudry, deceased, and Angele Beaudry, individually, to dismiss complainant's first amended bill of complaint, which said bill of exceptions was duly settled, allowed and approved by the above-entitled court on the 11th day of July, 1914, and was filed in the office of the Clerk of said Court on the 11th day of July, 1914.

(6) The judgment and decree of said Court given, made and entered on the 11th day of July, 1914.

(7) That certain stipulation between the parties hereto, consenting to the use of complainant's bill of exceptions to the said order granting said motion to dismiss as a bill of exceptions upon appeal from the judgment herein. [124]

(8) All papers filed by complainant herein in the prosecution of its appeal, including summons in severence, refusal to join, petition for appeal, assignment of errors, order permitting appeal, citation on appeal, appeal bond, and the approval of the same.

(Note:) In preparing the bill of exceptions referred to in the fifth specification hereinbefore, the Clerk is directed to pursue the following course:

Wherever in said bill of exceptions a document appears which already appears in the transcript, insert in lieu of said document a statement to the effect that said document already appears in the record. Thus, in lieu of inserting the first amended bill of complaint in said bill of exceptions, insert the following: "Here follows a copy of the first amended bill of complaint, with all exhibits annexed thereto, which said first amended bill of complaint and exhibits are already contained in this transcript, and are for that reason and to avoid useless repetition omitted at this point."

Dated, San Francisco, California, September 4th, 1914.

McCUTCHEN, OLNEY & WILLARD,
Solicitors for Complainant.

[Endorsed]: Filed Sep. 4, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [125]

*In the United States District Court, in and for the
Northern District of California, Second Division.*

No. 20.

THE TRINITY GOLD DREDGING AND
HYDRAULIC COMPANY, a Corporation,
Complainant,

vs.

ANGELE BEAUDRY, as Executrix of the Last
Will and Testament of FREDERIC BEAU-
DRY, Deceased, ANGELE BEAUDRY, Indi-
vidually, and GEORGE H. WHITELAW,
Defendants.

Admission of Service [of Praecept for Transcript of Record].

Admission of service and receipt of copy is hereby acknowledged on this 5th day of August, 1914, of the following:

1. Petition for Appeal;
2. Order Allowing Appeal and Fixing the Amount of Bond;
3. Assignment of Errors;
4. Bond on Appeal;
5. Summons in Severance;
6. Refusal to Join in Appeal;
7. Praecept to Clerk of United States District Court, Second Division;
8. Citation on Appeal.

The foregoing, all being portions of the proceedings in connection with the appeal of the complainant above named from the decree of the above-entitled court to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated, San Francisco, Cal., September 5th, 1914.

THOMAS B. DOZIER,

Attorney for Defendants, Angele Beaudry, as Executrix of the Last Will and Testament of Frederic Beaudry, Deceased, and Angele Beaudry, Individually.

[Endorsed]: Filed Sep. 5, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [126]

*In the District Court of the United States, in and for
the Northern District of California, Second
Division.*

No. 20.

THE TRINITY GOLD DREDGING AND
HYDRAULIC COMPANY, a Corporation,
Complainant,

vs.

ANGELE BEAUDRY, as Executrix of the Last
Will and Testament of FREDERIC BEAU-
DRY, Deceased, ANGELE BEAUDRY, Indi-
vidually, and GEORGE H. WHITELAW,
Defendants.

Clerk's Certificate to Record on Appeal.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing one hundred twenty-six (126) pages, numbered from 1 to 126, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for transcript on appeal, as the same remain on file and of record in the above-entitled cause, and that the same constitute the record on appeal to the United States Circuit Court of Appeals, for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is \$84.40; that said amount was paid by Messrs. McCutchen, Olney & Willard, attorneys for plaintiff; and that the original Citation issued in said cause is hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 4th day of September, A. D. 1914.

[Seal]

WALTER B. MALING,
Clerk.

By J. A. Schaertzer,
Deputy Clerk. [127]

*In the United States District Court, in and for the
Northern District of California, Second Division.*

No. 20.

THE TRINITY GOLD DREDGING AND
HYDRAULIC COMPANY, a Corporation,
Complainant,

vs.

ANGELE BEAUDRY, as Executrix of the Last
Will and Testament of FREDERIC BEAU-
DRY, Deceased, ANGELE BEAUDRY, Indi-
vidually, and GEORGE H. WHITELAW,
Defendants.

Citation [on Appeal (Original)].

United States of America,—ss.

The President of the United States to Angele Beaudry, as Executrix of the Last Will and Testament of Frederic Beaudry, Deceased, and Angele Beaudry, Individually:

You, and each of you, are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the City and County of San Francisco, State of California, on the 3d day of October, 1914,

being within thirty (30) days from the date hereof, pursuant to an order allowing an appeal filed in the Clerk's office of the District Court of the United States, for [128] the Northern District of California, Second Division, wherein the complainant herein, The Trinity Gold Dredging and Hydraulic Company, a corporation, is appellant, and you are appellees, to show cause, if any there be, why the decree rendered against said appellant, as in said order allowing said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, on this 4th day of September, A. D. 1914.

WM. C. VAN FLEET,

United States District Judge. [129]

Service of the within Citation and receipt of a copy is hereby admitted this 5th day of September, 1914.

THOMAS B. DOZIER,

Attorney for Defendants, Angele Beaudry, as Executrix of the Last Will and Testament of Frederic Beaudry, Deceased, and Angele Beaudry, Individually.

[Endorsed]: No. 20. In the District Court of the United States, Second Division, Northern District of California. The Trinity Gold Dredging and Hydraulic Company, a Corporation, Complainant, vs. Angele Beaudry, etc., et al., Defendants. Citation. Filed Sep. 5, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 2478. United States Circuit Court of Appeals for the Ninth Circuit. The Trinity Gold Dredging and Hydraulic Company, a Corporation, Appellant, vs. Angele Beaudry, as Executrix of the Last Will and Testament of Frederic Beaudry, Deceased, and Angele Beaudry, Individually, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Second Division.

Received and filed September 5, 1914.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

No. 2478

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE TRINITY GOLD DREDGING AND HYDRAULIC
COMPANY (a corporation),

Appellant,

VS.

ANGELE BEAUDRY, as executrix of the last will
and testament of Frederic Beaudry, deceased,
and Angele Beaudry, individually,

Appellees.

BRIEF FOR APPELLANT.

EDWARD J. McCUTCHEN,

WARREN OLNEY, JR.,

CHARLES W. WILLARD,

J. M. MANNON, JR.,

Attorneys for Appellant.

Filed

Filed this day of November, 1914.

NOV 6 - 1914

FRANK D. MONCKTON, Clerk

F. D. Monckton,
By
Clerk.

Deputy Clerk.

No. 2478

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE TRINITY GOLD DREDGING AND HYDRAULIC
COMPANY (a corporation),

Appellant,

vs.

ANGELE BEAUDRY, as executrix of the last will
and testament of Frederic Beaudry, deceased,
and Angele Beaudry, individually,

Appellees.

BRIEF FOR APPELLANT.

Statement of the Case.

Appellant was complainant in the court below in an action for relief upon rescission of a contract of sale of certain mining properties. The District Court granted a motion to dismiss which appellees interposed to appellant's amended bill of complaint, and from the judgment entered upon the order granting such motion this appeal is taken.

Appellant's amended bill of complaint sets up a cause of action for the rescission of a contract of sale,

wherein appellant's assignor agreed to purchase from one Frederic Beaudry, appellee's testator, twenty-one mining claims situated in Trinity County, California. The total purchase price was \$250,000, payable in specified instalments. Under certain extensions which were agreed to by the parties, and which are set out in the amended bill, the date of the last payment was fixed at December 31, 1912. On that date, when all save \$50,000 had been paid on the purchase price, appellant refused to make the final payment and demanded a rescission of the contract, basing its right to rescind upon the fact that its vendor's title to seven out of the twenty-one claims was "incurably defective by any ordinary method of business negotiation."

Appellee's motion to dismiss was based primarily upon two grounds: (a) upon the contention that the contract between appellant and Frederic Beaudry called only for a quitclaim deed of the latter's interest in the claims, and not for a valid title to the claims; (b) upon the contention that if, under the contract, the appellant had the right to rescind, such right of rescission was lost to appellant by *laches*.

There were a few minor grounds set out in the motion to dismiss, but the ones which we have noticed present the vital issues in the case.

The amended bill contains a more detailed statement of the facts above outlined. In the course of our argument we shall uniformly refer to appellant as complainant and to appellees as the defendants.

Specifications of Errors.

There are nine assignments of error (tr. fols. 113-116). They attack the action of the District Court in granting the motion to dismiss the amended bill and in entering judgment for the appellees, and particularly assail the conclusions of the learned district judge in holding that the contract between Frederic Beaudry and the appellant did not call for a valid title to the mining claims, and that appellant was barred by *laches*.

Brief of the Argument.

I.

**The Contract Called for a Valid Title to the Mining Claims,
Not a Mere Quitclaim of Beaudry's Interest. It Did
Not Call for Patents, but it Did Call for Validly
Located Mining Claims, as Distinguished From Mere
Prospects.**

(1) THE TERMS OF THE CONTRACT CONSIDERED.

The contract involved was dated July 21, 1906, and is set forth as Exhibit "A" to the claim annexed to the amended bill as Exhibit "A" (tr. fols. 66-70). It was an agreement upon the part of Fred Beaudry, defendant's testator, to sell twenty-one mining claims. Eight of these claims are described as "patented"; eight as "unpatented"; and five as "receiver's receipts". Beaudry is described as

"being the sole owner and in possession of"

the said claims (tr. fol. 66), and as such he agrees

"to make a good and sufficient deed for all of said properties, free from all incumbrances" (tr. fol. 68).

In another part of the contract it is provided that upon breach of any condition by the vendee, Beaudry shall be released

“from any obligation in law or equity to convey said properties” (tr. fol. 69).

In a subsequent modification of the agreement, complainant agreed to bear the expense of certain contests brought by the United States Government with respect to the unpatented claims (tr. fol. 82). This was the only modification which is alleged to affect the interpretation of the contract in this regard.

(2) **IN THE ABSENCE OF EXPRESS PROVISION TO THE CONTRARY, A CONTRACT FOR THE SALE OF REALTY REQUIRES THE VENDOR TO CONVEY A GOOD TITLE.**

We shall rest our main contention upon the propositions that the contract here involved cannot be construed as a contract for the vendor's interest only; first, because it contains express covenants and language calling for a valid title; secondly, because it contains nothing to stamp it as an agreement for a quitclaim.

We desire to show first, however, that in order to establish the character of this contract as a contract for a quitclaim deed, the burden was upon the defendants to remove the contract from the application of the general rule. An unqualified agreement to sell realty imposes upon the vendor the obligation to convey a good title. The mere agreement to sell carries an implied agreement “that the vendor's conveyance will transfer a good title”.

Wilcox v. Lattin, *infra*.

It devolves upon defendants, therefore, to show that Beaudry's agreement was qualified, and that which is relied upon as such a qualification must be strong enough to overcome the covenant implied from the agreement to sell, and must not be outweighed or offset by other express provisions of the contract.

39 Cyc., 1442.

"In the absence of an express provision indicating the character of title provided for by a contract of sale of real property, the implication is that a good or marketable title in fee simple is intended in all executory contracts, and as a rule the purchaser is under no obligation to accept a defective title."

Wilcox v. Lattin, 93 Cal. 588, at p. 594.

"The vendor in any executory agreement for the sale of land impliedly represents that he has a good title thereto as one of the considerations for inducing the vendee to enter into the contract, and that the conveyance therein agreed to be made by him will transfer such title."

Easton v. Montgomery, 90 Cal. 307, at p. 314.

"In every executory contract for the sale of land, there is an implied condition that the title of the vendor is good, and that he will transfer to the vendee, by his deed of conveyance, a title unencumbered and without defect."

Penfield v. Clark, 62 Barb. 584.

"In every contract for the sale of land there is an implied warranty that the vendor has a good title; unless the warranty is *expressly excluded by the terms of the contract*. The provision for a covenant in the deed against the vendor's own

acts, is not an express exclusion of the implied covenant, and is not in any manner inconsistent with it."

Burwell v. Jackson, 9 N. Y. 535, at p. 539.

"The vendors agreed that on the performance by the purchaser of the covenant on his part, they would 'execute or cause to be made and executed unto the said party of the second part, or his legal representative or representatives, on the first day of June, 1836, a good and sufficient deed of conveyance of a certain lot of land', etc. Is the covenant satisfied by the execution of a deed good in point of form merely?, or does it require such a deed as will convey a good title to the land sold? If those obvious principles of natural justice, which the law applies to analogous cases, are to be applied to this, it would seem that the question here presented ought not to admit of serious doubt. Upon every sale of a chattel, the law implies a warranty on the part of the vendor that he is the owner of the property and has a right to convey, although nothing whatever is said on the subject. This is not an arbitrary or accidental rule, but one which rests upon a solid foundation of reason and justice. It is fair and just to presume that a vendor knows the nature and extent of his own rights. The vendee has not the same means of knowledge. To require a vendor, therefore, to make good the title to that which he assumes to sell, is simply requiring him to guarantee that he is not committing a fraud."

* * * * *

"I have no hesitation, therefore, in holding that, under a covenant, like that in this case, to execute 'a good and sufficient deed of conveyance' of lands, a vendor has a right, if he discover the title to be defective, to refuse to receive it, and this right is not affected by the fact that the defect might

have been discovered, at the time of entering into the agreement to purchase, by an examination of the public records.”

**(3) THE CONTRACT CONTAINS PROVISIONS UNIFORMLY HELD
TO CALL FOR TITLE.**

Certain definite phrases or expressions have been construed repeatedly by the courts as stamping the contract containing them as an agreement to convey a good title, as distinguished from an agreement for a quitclaim of the vendor's interest. Whenever these expressions are found in a contract for the sale of realty, the vendor is foreclosed from asserting that the contract is simply for a quitclaim.

Thus, in

39 Cyc., 1445,

it is said:

“Particular provisions are frequently found in contracts which specifically or by implication require the vendor's title to be good. Thus it has been held that the conveyance of a good title by the vendor is required where a contract for the sale of land provides for a * * * deed or conveyance ‘clear of all incumbrances’ * * * ‘a good and sufficient conveyance’, etc.”

- (a) *The covenant “to make a good and sufficient deed” is a covenant to convey a valid title.*

It is now well settled that where a contract for the sale of realty contains a covenant that the vendor will “make a good and sufficient conveyance”, the vendor is bound to convey a good title. The covenant

is now uniformly held to relate to the title to be conveyed by the deed; not to the form of the deed.

Turner v. Ogden, 66 U. S. 450; 17 L. ed. 203.

“Where the words of plaintiff’s covenant are, ‘that he will make a deed’ to his vendees, the meaning of these words in the contract requires that the deed shall convey the land, and it is not sufficient to aver plaintiff’s readiness to perform, merely according to the letter of the contract.”

Haynes v. White, 55 Cal. 38.

“An agreement to sell land, and, upon the payment of the purchase money, to execute a good and sufficient deed therefor, requires of the vendor to convey to the vendee the *title* to the land, and is not satisfied by the tender of a deed sufficient in *form*, when the vendor has, in fact, no title to convey.”

Gates v. McLean, 70 Cal. 45.

“The effect of the promise (averred in the complaint to be in the contract) that plaintiff should execute and deliver ‘a good and sufficient conveyance’ was the same as a promise that he should convey the title.”

Burwell v. Jackson, *supra*.

Quoting from the syllabus:

“A covenant, therefore, by the vendors, that they would execute to the purchaser on a certain day ‘a good and sufficient deed of conveyance’ of a certain lot of land, was held to bind the vendors to convey a good title to the purchaser.”

In two early California cases a contrary rule was laid down:

Brown v. Covilland, 6 Cal. 566;

Green v. Covilland, 10 Cal. 322.

These cases are, of course, overruled by the later decisions above referred to.

Haynes v. White, supra;

Gates v. McLean, supra.

So also, the rule has been adopted after careful judicial consideration in New York.

Penfield v. Clark, 62 Barb. 584, at p. 590.

“It has been held, in a few cases, that when the vendor covenanted to convey by a good and sufficient deed, or a good warranty deed of conveyance, his covenant was satisfied by a deed good and sufficient in form, notwithstanding the title may have been incumbered, or otherwise defective. (*Gazley v. Price*, 16 John. 267; *Parker v. Parmele*, 20 id. 130; *Fuller v. Hubbard*, 6 Cowen 13). These cases are substantially overruled in the following cases: *Clute v. Robison*, (2 John. 594); *Judson v. Wass*, (11 id. 525); *Van Epps v. Schenectady*, (12 id. 436); *Fletcher v. Button*, (6 Barb. 646); *S. C.* (4 N. Y. 396); *Carpenter v. Bailey*, (17 Wend. 244); *Pomeroy v. Drury*, (14 Barb. 418); *Atkins v. Bahrett*, (19 id. 639); *Everson v. Kirtland*, (4 Paige 628); *Traver v. Halsted*, (23 Wend. 66); *Burwell v. Jackson* (9 N. Y. 535).”

The following comment upon the state of the law as to such a covenant appears in

39 Cyc., 1449:

“In a few cases it has been held that an agreement to convey by a ‘good and sufficient deed’ refers only to the form of the conveyance and merely binds the vendor to make a conveyance sufficient to pass his title, whatever that may be; and so it has been held in some cases of an agreement to execute a ‘good and sufficient warranty deed’, or a ‘special warranty deed’. These decis-

ions, however, are contrary to the weight of authority, and in some jurisdictions they have been expressly or impliedly overruled."

In a note to

Porter v. Noyes, 11 Am. Dec. at p. 34,

it is said:

"Owing to certain anomalous decisions, made at an early period in New York and Massachusetts, which have been occasionally recognized as authoritative, there is some conflict in the American cases upon the point as to whether a contract to make a 'good and sufficient deed', or a 'good warranty deed', or a deed with covenants of a particular character, may, or may not, be satisfied by a deed which is good in point of form although the grantor has in fact no title, or only a defective title."

* * * * *

"The undoubted weight of authority, however, is against the doctrine laid down in the New York and Massachusetts decisions above mentioned. Indeed, the New York cases have been practically if not expressly overruled, and are not now regarded as authoritative upon this point in that state."

* * * * *

"It is conceived that the general rule may be more accurately stated to be, in accordance with the doctrine of *Burwell v. Jackson*, 9 N. Y. 535, that whatever may be the form of words used in an executory contract for the sale of land, the vendor must make a good title, unless it distinctly appears, either from the contract, or from the attendant circumstances, that such was not the intention of the parties. The cases in which the contract may be satisfied by a deed formally complying with its terms, although the vendor may have only a defective title, or no title at all, are to be regarded as exceptional, and like all other exceptions, should be clearly made out in order to remove them from the operation of the rule.

“The obligation of the vendor to convey a good title, in order to fulfill his contract, unless he has taken care to restrict his liability, rests not only on the doctrine of implied warranty of title, as decided in *Burwell v. Jackson*, 9 N. Y. 535, and *Lounsberry v. Locamberg*, 25 N. J. Eq. 554, but also upon the general principle that the promises and engagements contained in a contract are to be construed most strongly against the party making them. It certainly ought to be a very clear case which would permit a party who has contracted to sell land, to perform his contract by giving the purchaser a deed which conveys nothing but a lawsuit. This is to put the shadow for the substance. Of course, a man may bargain for a doubtful title, but he ought not to be held to have done so except upon the most satisfactory evidence that such was his intention, for that is a species of traffic which the law has never favored. It is repugnant to sound legal principles and policy to require a party to accept a deed whose only value consists in a right of action on its already broken covenants, unless it is certain that that is what he meant to buy.”

We have gone into a thorough discussion of this rule because it is apparent that under what is now the settled rule of construction of a covenant “to give a good and sufficient deed”, the contract here involved calls for a good title. Independently of all other considerations, therefore, it is submitted that the presence of this covenant in the contract answers defendants’ contention that Beaudry was only required to give a quitclaim deed—and answers it in the negative.

But there are in the contract other provisions which compel the same conclusion.

- (b) *The recital as to Beaudry "being the sole owner" of the claims shows that a good title was being bargained for.*

In the contract, and in the very sentence wherein Beaudry grants the option, Beaudry is described as

"being the sole owner and in possession of"

the mining claims (tr. fol. 66).

The effect of such a recital, taken in connection with the covenant to "make a good and sufficient conveyance" has been construed by the Supreme Court of Wisconsin in

Taft v. Kessel, 16 Wis. 291, at p. 294:

"We think the contract obviously required the plaintiff to give the defendant a good title, except that the covenant against encumbrances was to be limited to those 'made or suffered by, through or under' the vendor. *It expressly recited that the plaintiff was the 'owner'*, and had agreed to convey to the defendant 'by a good and sufficient deed', etc. This shows clearly that the parties did not contemplate a mere quitclaim, but were bargaining for the conveyance of a complete title, except as modified by the limitation of the covenant against encumbrances, to those made or suffered by or under the grantor."

- (c) *The covenant to execute a deed "free and clear of all encumbrances" bound Beaudry to convey a marketable title.*

In

Gervaise v. Brookins, 156 Cal. 103,

the Supreme Court of California said:

"The contract states that Book 'agrees to sell' to the vendees, 'all his right, title and interest

in' the lots, and that, upon payment of the full price, he will 'execute a deed of grant, bargain and sale of said lots (describing them) free and clear of all encumbrances'. The effect of these provisions is that Book was bound to convey to the vendees, upon payment, a good title in fee to the lots."

See also

Porter v. Noyes, 2 Me. 22; 11 Am. Dec. 30;

Cogan v. Cook, 22 Minn. 137;

Van Kevren v. Siedler, 73 N. J. Eq. 239; 66 Atl. 920.

(4) **THERE IS NOTHING TO INDICATE THAT THE CONTRACT CALLED MERELY FOR BEAUDRY'S INTEREST IN THE CLAIMS.**

It has been shown that the general rule of construction of contracts for the sale of realty is that the vendor is required to convey a good title, and that where merely a quitclaim is desired, the language of the contract must clearly express that intention. The contract involved in this case is devoid of any express declaration of such intention. We respectfully submit that it is devoid of any feature that could stamp it as an agreement for a quitclaim deed.

(a) *The language of the contract not that of a contract for a quitclaim.*

The normal language of a contract calling for a quitclaim is that the vendor will convey "his right, title

and interest''. There is no such expression in the present contract. Beaudry did not covenant to convey his interest in the claims, but that "being the sole owner and in possession of the claims" he would "make a good and sufficient deed of them free and clear of all incumbrances".

Again his obligation under the contract is spoken of as his "obligation to convey the claims"—not his obligation to convey his *right, title or interest in the claims*.

(b) *The circumstances surrounding the sale do not suggest that a contract for a quitclaim of Beaudry's interest was intended.*

By the terms of the contract complainant and its predecessors undertook to pay a quarter of a million dollars for the claims. They further undertook to spend large sums of money in permanent improvements upon the claims. Upon the face of the bill it appears that these claims were not producing; that they required development work of an expensive character. In seven years the gross return did not exceed \$35,000, and the cost of operation to complainant exceeded that sum. The outlay of so large an amount of money upon a non-producing property would in itself render it unlikely that complainant or its predecessors acted in the belief that they were buying less than a full and complete title to the claims. Their profit was to come, if at all, from the continued ownership and development of the claims—not from a transitory or uncertain possession.

(c) *The fact that when litigation arose as to the title to the claims complainant agreed to bear the expense of it, does not indicate that Beaudry was not bound to convey a good title.*

During the life of the contract, complainant obtained from Beaudry an extension of time to meet some of the payments. As a part of the consideration for the extension complainant agreed to assume the expenses in connection with the contests instituted by the United States Government to cancel certain of the claims (see the argument of December 11, 1909, annexed as Exhibit "E" to the claim, tr. fol. 82).

The original contract was entered into in July, 1906. The contests instituted by the Government were unheard of until August, 1908. The supplemental agreement referred to was made in December, 1911. None of its provisions, therefore, can be said to reflect the intention of the parties in entering into the contract. It is clear that the only effect of the agreement was to apportion certain items of expense that came up during the life of the contract,—items arising years after the contractual relations of the parties had been definitely settled.

If the original contract, as it existed down to December 11, 1911, had been susceptible to the construction that Beaudry was not required to give more than a quitclaim of his interest, there would have been no need for these provisions in the contract of December 11, 1911.

The burden of paying the expenses in that event would have rested on complainant without it.

It is apparent that in return for the extensions granted by Beaudry, complainant assumed a new obligation—it agreed to pay certain expenses which otherwise Beaudry would have been compelled to pay *owing to his obligation under the original contract to give a good title*.

It is not the law that a vendee waives the benefit of the vendor's covenant for title by agreeing to pay the expenses of litigation necessary to cure a defect. Nor can it be said that such action on his part is evidence that he expected less than a good title from his vendor.

If a contract for the sale of realty requires the vendor to furnish a valid title, the vendor must bear the expense of adverse litigation.

Patreski v. Minzgohr, 108 N. W. 77 (Mich. 1906).

“While a vendee under a contract of sale in possession of land is a trustee for his vendor, and cannot acquire for his own benefit a title hostile to his vendor, he is entitled in equity to reimbursement for reasonable advances expended in fortifying the vendor's title.”

The fact, therefore, that Beaudry exacted a covenant that complainant should pay the expenses of the litigation over the claims in return for an extension of the time for certain payments, is evidence *that under the original contract as it then stood, Beaudry himself was bound to meet the expenses*.

This could not have been true if the contract called simply for a quitclaim of Beaudry's rights in the claims. It follows, therefore, that the contract required

the conveyance of title,—not alone of Beaudry's interest, but a good title.

(5) **MINING CLAIMS ARE REAL PROPERTY. THE SAME RULES GOVERN THE CONSTRUCTION OF A CONTRACT FOR THE SALE OF MINING CLAIMS AS FOR THE SALE OF ANY OTHER SPECIES OF REAL PROPERTY.**

In holding that the contract of July 21, 1906, called only for a quitclaim deed of Beaudry's title to the mining claims, the learned district judge said:

“The property is nowhere described as real estate. It is described, as I have said, as certain mining property, and giving a specific designation of the particular claims and how they are held” (tr. fol. 101).

The contract provided that Fred Beaudry,

“being the sole owner and in possession of certain gravel mines, together with the timber, the improvements thereon, etc. * * *; including *those certain mining claims* and properties known as (then follow the names of the various claims with a statement after the name of each claim as to whether it had or had not been patented, and, as to the Greenhorn group of claims, a statement that receiver's certificates had been issued), does hereby grant to the said party of the second part an option to purchase the above described mines and *mining claims*, lands and properties, * * *” (The italics are ours.)

From the fact that the properties are referred to in the contract as mining claims, it follows, as a matter of law, that they were treated in the contract as real property. A mining claim is universally recognized as real property.

In

Merritt v. Judd, 14 Cal. 59,

at page 64, Mr. Justice Baldwin, speaking for the Supreme Court of California, said:

“From an early period of our State jurisprudence, we have regarded these claims to public mineral lands, as titles. They are so practically. It is very evident that the government will not change its policy in respect to them—that they will not be sold, nor the present tenure altered. Our courts have given them the recognition of legal estates of freehold, and so, to all practical purposes—if we except some doctrine of abandonment, not, perhaps, applicable to such estates—unquestionably they are, and we think it would not be in harmony with this general judicial system to deny to them the incidents of freehold estates in respect to this matter.”

In that case the holding was that mining claims were to be treated as real property for the purpose of applying the rule of fixtures.

It has also been held that mining claims are real property within the meaning of Section 1091 of the Civil Code of California providing that real estate can be transferred only by an instrument in writing.

Melton v. Lambard, 51 Cal. 258;

Garthe v. Hart, 73 Cal. 541;

Moore v. Hamerstag, 109 Cal. 122.

A mining claim has been held to be subject to sale under execution.

McKeon v. Bisbee, 9 Cal. 137.

Mining claims are lienable as real property under the Mechanics' Lien Statute of California.

Berentz v. Belmont Oil Mining Co., 148 Cal. 577.

We submit, therefore, that because the contract of July 21, 1906, named the claims and referred to them as mining claims, that contract must be construed in accordance with the rules applicable to any contract for the sale of real property. Under the principles heretofore considered, it is clear that the contract so construed called for a valid title to the mining claims.

(6) THE LANGUAGE USED IN THE CONTRACT DESCRIPTIVE OF THE MINING CLAIMS NEGATIVES THE IDEA THAT MERE PROSPECTS WERE IN THE MINDS OF THE PARTIES.

The contract recites that Beaudry was the owner of "certain gravel mines, together with the improvements, timber, etc., thereon, including those certain *mining claims* and properties" known under the names given in the contract. It then provides that Beaudry grants to the party of the second part an option to purchase "the above described mines *and mining claims*, lands and properties".

Thus the properties are first referred to as mines and are then said to include certain "mining claims".

If the intention of the parties had been simply to deal with mining prospects represented by a bare possession on the part of Beaudry, it is inconceivable that what Beaudry sold should have been described as including "mines *and mining claims*". It is evident that

they used the term "mining claims" as contradistinguished from the physical properties themselves.

The term *mining claims* was obviously intended to cover something in addition to what had already been covered by the term *mines*.

Not only is it apparent from the language of the contract that the parties did not intend to buy and sell a mere possession or mere mining prospects, but it is equally apparent what they did intend to buy and sell. *That was the government title to the claims.* After each one of the twenty-one claims which are specifically named in the contract appears a designation showing to what extent the government title had been obtained. After certain of the claims appears the word "patented"; after certain other of the claims appears the word "unpatented"; and after the claims included in the so-called Greenhorn group appears the phrase "receiver's receipt".

Had the parties intended to deal with mining prospects represented merely by Beaudry's possession, the recitals as to whether the claims were patented or unpatented, or confirmed by receiver's receipts, would have been unnecessary and immaterial. These descriptive adjectives appended after the names of the respective claims show that the parties intended by the use of the term *mining claims* in the contract to refer to claims based upon proceedings in accordance with the United States Statutes, and not to mere mining prospects based upon bare possession.

The mere fact that Beaudry did not agree as to all the claims that he would give a patent is not indicative

that he did not agree to give at least an inchoate title to the claims. Title to mining claims vests before patent has issued.

Bash v. Cascade Mining Co., 69 Pac. 402 (Wash. 1902).

“Where the vendor of a mining claim, who has entered, has paid for the claim, and obtained a certificate of purchase from the government, tenders a deed in pursuance of his contract of sale, the vendee cannot refuse the deed, and rescind the contract, merely because the vendor has not received his patent for the claim.”

Benson Mining & Smelting Co. v. Alta Mining & Smelting Co., 145 U. S. 428; 36 L. ed. 762.

“There is no conflict in the rulings of this court upon the question. With one voice they affirm that, when the right to a patent exists, the full equitable title has passed to the purchaser, with all the benefits, immunities, and burdens of ownership, and that no third party can acquire from the government interests as against him.”

Carroll v. Safford, 3 How. 441; 11 L. ed. 671.

“Lands which have been sold by the United States can in no sense be called the property of the United States. They are no more the property of the United States than lands patented. So far as the rights of the purchaser are considered they are protected under the patent-certificate as fully as under the patent.”

It is submitted that when Beaudry agreed to sell claims designated as “patented”, the use of the word “patented” amounted to a covenant upon the part of Beaudry that he would convey a valid title, fortified by a United States Government patent to such claims;

that as to the claims which were described as “unpatented”, he covenanted to convey a valid title fortified by a valid mining location, as to which patent had not yet issued; that as to the claims designated as “receiver’s receipts” he covenanted to convey a valid title acquired from the United States Government by a valid mining location, and further fortified by a valid receiver’s receipt, although patent had not issued.

A very similar contract was involved in the case of

La Grange Inv. Co. v. Shaw, 72 Pac. 795 (Ore. 1903).

In that case the plaintiff had agreed to sell the defendant certain “mining claims”. In the contract the names of the respective claims were given, and the contract further contained recitals as to when the claims had been located. There was no covenant by the plaintiff to convey patented claims. It developed that, as to certain of the claims, the plaintiff did not have valid locations. It was held by the Supreme Court of Oregon, speaking through Judge Wolverton, that this contract called for a title to mining claims as distinguished from mere prospects. The fact that the claims were mentioned as having been located was noticed as being a representation that the claims were more than mere prospects—that they were validly-located claims. The holding of the court is thus stated in the syllabus:

“A contract by which plaintiff agrees to deed defendant certain mining claims, naming them, and stating where they were located, is a representation that they are mining claims, and not mere prospects.”

Speaking for the court, Judge Wolverton said:

“A person may sell a mining prospect, and deed it, if he so desires, by quitclaim or otherwise, and it would constitute a sufficient consideration for the payment of money, even if it proved worthless, if he sold as a prospect. But in the case at bar the plaintiff contracted for the sale and conveyance of quartz and placer mining claims, coupled, as defendant alleges, with representations that they were such, when in truth and in fact none such existed to plaintiff's knowledge; and the issue is on the fraudulent representations as to the mining claims. The attempt, so far as the pleadings show, was not to sell a prospect, *but certain mining claims, represented to be such*. Such was the theory adopted by the trial court, and we think is the proper one to be maintained under the issues.

Instruction No. 3 is but a sequence of the second, and unexceptionable.

By the fourth the jury were told that: ‘By the terms of the contract set out in the complaint the plaintiff sold to the defendant certain mining claims, and the contract itself is a representation made by the plaintiff to the defendant that the mining claims mentioned in the contract were mining claims as stated therein.’ It is argued that no such a result could follow. Why not? The contract recites that ‘in consideration’, etc., ‘the said party of the first part (plaintiff) has caused to be executed to the said second party (defendant) a mining deed for an undivided one-half interest in and to the following mining claims, to wit: The Humpback quartz claim, which was located on Sep. 14, 1899’, etc., the ‘Charley Boy quartz’, the ‘Kansas Girl quartz claim’, and so on, throughout the whole list, including ‘Miney Yon placer claim’ and ‘Dandy Joe placer claim’, stating when and where and how located, together with recording of notice, etc. These statements, whether in a contract or not, it seems to us, operate as representations concern-

ing such claims, to be considered with all the other representations that plaintiff may have made to defendant relative thereto."

That the parties were contracting for a government title as opposed to mere possession without a right to possession is shown by the use of the term *mining claims* in addition to the word mines, and because the agreement itself specified the steps already taken toward the acquisition of the government's title.

It is submitted that the learned district judge erred in holding that the contract of July 21, 1906, was for a quitclaim deed. That it called for a valid title to the claims we believe has been demonstrated, because:

(1) The contract contained covenants uniformly held to require valid title and not a quitclaim;

(2) The contract has none of the characteristics of a contract for a quitclaim deed;

(3) Mining claims are real property and contracts for the sale of mining claims are therefore to be construed by the same rules which govern the conduct of contracts for the sale of other kinds of real property;

(4) It is evident that the parties to the contract in using the term "mining claims" referred to claims located in accordance with the United States Statutes, and agreed to buy and sell claims fortified by valid locations, as distinguished from mere prospects dependent upon bare possession. This is so, first, because the phrase "mining claims" is used in the contract in

addition to the term "mines"; and secondly, because it is modified by terms relating to the various stages which Beaudry's application for patents to the claims had reached.

II.

Complainant was not Guilty of Laches in Rescinding.

There were two sets of contests instituted by the United States which culminated in the failure of Beaudry's title to seven out of the twenty-one claims—nine hundred out of the three thousand acres—which defendant was bound to convey.

(a) *The Long Gulch claim (120 acres) and The Mule Creek Ridge claim (160 acres).*

July 21, 1906—Beaudry's application for patent pending.

Aug. 13, 1908—United States filed contest to Mule Creek Ridge application.

Sept. 10, 1908—United States filed contest to Long Gulch application.

May 25, 1910—Adverse decision by Register and Receiver of Land Office at Redding, California.

Apr. 7, 1911—Adverse decision by General Land Office at Washington.

May 23, 1911—Adverse decision by Department of Interior on appeal from order of General Land Office.

Sept. 13, 1912—Defendant's Petition for rehearing denied by Department of Interior and entries finally held for cancellation.

Oct. 1, 1912—Complainant first learned of denial of petition for rehearing.

(b) *The Greenhorn Claims (5 claims, 620 acres).*

July 21, 1906—Beaudry's application for patent pending.

Oct. 8, 1908—United States files contest to application.

Dec. 14, 1909—Hearing upon contest in Land Office at Redding halted; Register certifies question as to right of Beaudry to withdraw application without prejudice to right to renew same to General Land Office.

Mar. 9, 1912—General Land Office denies to Beaudry right to withdraw application and orders hearing in Land Office at Redding to proceed.

Dec. 31, 1912—Appeal by defendant to Department of Interior from above order of General Land Office still pending undetermined.

In answering the contention that complainant has been guilty of laches, we are confronted with two questions:

When did the right to rescind first arise?

What delay occurred thereafter and was it inexcusable?

(1) **COMPLAINANT COULD NOT HAVE RESCINDED BEFORE
OCTOBER 1, 1912.**

- (a) *The Pendency of the Contests Prior to October 1, 1912, did not give a Right of Rescission.*

The entire course of the litigation over the claims is set forth in exact detail in the amended bill. (Par. VIII of the amended bill, tr. fols. 12-28.)

It is alleged that the contests were instituted in the fall of 1908. But the mere pendency of the contests gave complainant no right to rescind. This is particularly true when the vendee continues through a long period to perform its part of the contract, relying upon repeated assurances by its vendor that the pending litigation is futile or unmeritorious. The amended bill alleges in this regard,

“that at all of the times prior to the denial of said petition for rehearing by the Department of the Interior, this complainant was assured by said Beaudry, and after the death of said Beaudry by the said Angele Beaudry, as his executrix, that grounds existed for the reversal of the action of the Commissioner of the United States Land Office holding said Fred Beaudry’s entry to said Long Gulch placer claim for cancellation, and that a patent to said mining claim would eventually issue to said Beaudry or to his executrix” (tr. fol. 16);

that such representations were made for the purpose of inducing complainant to continue making payments under the contract and that they were so acted upon by complainant (tr. fol. 17); also that similar representations were made as to the other claims (tr. fol. 27).

Wilcox v. Lattin, 93 Cal. 588.

In this case the claim was made that a vendee had lost his right to rescind by delaying after the institution of litigation hostile to his vendor's title. We quote from the opinion of Judge Harrison at p. 594:

“The objection that this right of rescission was waived by the plaintiffs by their delay in asserting it cannot be maintained. They were at liberty to consider that the title of the defendant was as he had represented it, until it was determined otherwise by the court. The mere assertion of an adverse claim by a stranger would not justify them in pronouncing the title bad, and thereupon rescinding their agreement. Even after the action had been brought upon the adverse claim, the defendant assured them that there was nothing in the claim, and that it would be soon disposed of by the judgment, and requested them not to make any further sales until he could ascertain what could be done; and after the judgment he made the same representations, and gave them to understand that he would appeal therefrom, and upon such appeal establish his title. The judgment was entered on the 7th of June, 1888, and on the 12th of September thereafter they gave the notice of rescission. We think that, under the circumstances shown, they used reasonable diligence in exercising their right of rescission.”

The precise point is dealt with in the case of

Nealon v. Henry, 131 Mass. 153.

It was there held that:

“When a defect in title depends upon a question of fact, and litigation with reference thereto is assumed by the vendor, the vendee is entitled to await the outcome of such litigation before exercising his right to rescind for such defect.”

See also footnote to

30 L. R. A., New Series, p. 876.

- (b) *It was only when the title to the claims became "incurably defective by any ordinary method of business negotiation" that complainant's right to rescind arose.*

Under California law a vendee cannot rescind upon the ground that his vendor is without title prior to the time when the vendor has agreed to convey.

Backman v. Park, 157 Cal. 607.

"It is the settled rule in this state that the vendor need not have at least an inchoate title at the time of the contract; but that one may sell land to which he has no title, and the contract will be valid and enforceable if at the time of performance by him he is able to furnish a good title."

Joyce v. Shafer, 97 Cal. 335;

Shively v. Semi-Tropic Land & Water Co., 99 Cal. 259;

Garberino v. Roberts, 109 Cal. 126;

Latimer v. Capay Valley Land Company, 137 Cal. 286;

Hanson v. Fox, 155 Cal. 106.

The single exception to this rule is stated as follows in

Prentice v. Erskine, 164 Cal. 446.

"A vendor under an executory contract for the sale of land, the title to which at the time of the execution of the contract was incurably defective by any ordinary method of business negotiation,
* * * is himself in default under the contract, and such default entitles the vendee to rescind the contract at any time, even though the time for

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* * * is himself in default under the contract, and such default entitles the vendee to rescind the contract at any time, even though the time for

final payment of the purchase price has not arrived, and to recover the part payments made under the contract.”

- (c) *Title to the Long Gulch and Mule Creek Ridge claims became incurably defective for the first time on September 13, 1912, and complainant first knew of it October 1, 1912.*

Under the authorities cited above, complainant would have obtained no right to rescind had defendant's title to the claims *merely failed*. Had complainant discovered on October 1, 1912, that Beaudry had never owned any of the twenty-one claims, or, having once owned them, had conveyed them, it could not have rescinded upon that ground. The final payment was due January 1, 1913, and that was the day fixed by the contract for the conveyance of title. Neither Beaudry nor defendant were obliged to own or acquire title prior to that date.

On October 1, 1912, however, it became certain not only that defendant did not have title to the Long Gulch and Mule Creek Ridge claims, but *that she could not possibly obtain it by January 1, 1913,—that her title was “incurably defective by any ordinary method of business negotiation”*. The claims were finally adjudicated to be non-mineral and they lay within the boundaries of a National Forest Reserve. The Government, therefore, would never patent them—title could never be bought nor acquired. If any further steps might have been taken to obtain the title, defendant did not take them, and it is certain that on December 31, 1912, when complainant rescinded, defendant could not have

put through a new application nor could she have done anything else that could have enabled her to convey a good title on January 1, 1913.

- (d) *Complainant's right to rescind was perfect on October 1, 1912, by reason of the failure of title to the Long Gulch and Mule Creek claims. An additional right of rescission arose thereafter when, on December 31, 1912, it became apparent that "by no ordinary method of business negotiation" could defendant give a good title to the Greenhorn claims on January 1, 1913.*

It is true that the mere pendency of litigation hostile to a vendor's title prior to a date when the vendor is called upon to convey, will not give the vendee the right to rescind. Consequently the mere pendency of the contests as to the Long Gulch and Mule Creek Ridge claims did not afford complainant a right of rescission. Such right did not arise until the final adverse decision of the litigation.

When, however, the mere pendency of undetermined litigation at a time immediately before the time when title is to be conveyed by the vendor, creates a situation where the vendor cannot possibly cure the defect in his title within the time limited in the contract of sale, the pendency of such litigation, will, itself, give a right of rescission. Such a situation as this is instanced by the failure of title to the Greenhorn claims on December 31, 1912. Whenever, and however, a vendor's title is in such a condition that it cannot be cured prior to the

date on which a conveyance is to be made "by any ordinary method of business negotiation", his vendee may rescind.

Complainant's right to rescind became complete on October 1, 1912, by the failure of defendant's title to the Mule Creek and Long Gulch claims. When the Department of the Interior denied the petition for the rehearing it instantly became conclusively established that "by no ordinary method of business negotiation" could defendant give such a title to those claims on January 1, 1913.

It is true that there was no final decision of the Greenhorn contests prior to January 1, 1913. It is perfectly clear, however, that on December 31, 1912, the day upon which complainant offered to rescind, defendant's title as to the Greenhorn claims had failed so that it was "incurably defective by any ordinary method of business negotiation".

Even had the Department of the Interior reversed the decision of the General Land Office on that date, defendant's title could not possibly have been cured by January 1, 1913. The order appealed from was merely an interlocutory order—not a final order as in the case of the other contests. The only result of a reversal would have been to have allowed defendant to withdraw her pending application for patents. It would have left her with nothing to convey to plaintiff on January 1, 1913, but an asserted interest in the claims,—an interest which had been unable to withstand an attack by the Government and which, therefore, would be unmerchable.

Complainant's first right to rescind arose October 1, 1912. Upon principles which are too well recognized to be seriously questioned, complainant would have been denied relief by a court of equity had it attempted to rescind prior to that date.

(2) **THE DELAY OF THREE MONTHS IN RESCINDING WAS EXCUSABLE AND DID NOT CONSTITUTE LACHES.**

(a) *The time itself was short.*

Complainant's right to rescind accrued on October 1, 1912. Complainant offered to rescind on December 31, 1912.

The contract had been in existence for almost seven years when complainant's right to rescind arose. Complainant had paid \$200,000 upon the price of the claims as against \$50,000 which remained unpaid, and had in addition expended \$100,000 more in expenses of operation, permanent improvement, etc. (tr. fol. 20).

In view of these facts alone, it is submitted that the holding of the learned district judge, that complainant was barred by *laches* by a delay of three months, was unjustified.

In

Marston v. Simpson, 54 Cal. 189,

the plaintiff sought to rescind a contract for the sale of mining stock. It was held that a delay of *six months* after discovery of the fraud did not constitute laches.

In

Quarg v. Scher, 136 Cal. 406,

plaintiff sought to rescind an agreement for the sale

of real estate upon the ground that a tract represented to contain forty acres in fact contained only twenty-three and one-half acres. The discrepancy was disclosed to the plaintiff by a survey *eight* months prior to his offer to rescind. It was held that plaintiff was not barred by laches, the court saying:

“It appears from the evidence that defendant had strictly complied with his contract in the matter of payments of yearly installments and interest up to the time of the discovery of a deficiency in the acreage; and that his subsequent offers of rescission and tender of payment and demand for deed were made within eight months after the survey was made, and about the time or within a very few days after the first unpaid installment of principal and interest fell due. We think on the facts hereinabove presented there is no laches shown on the part of defendant of which the plaintiffs can be heard to complain, even if the question of laches were properly presented.”

Defendant's chief reliance in the court below was placed upon

Cross v. Mayo, 46 Cal. Dec. 173.

In that case the plaintiff sued to enforce a contract for the sale of land. The defendant attempted to rescind the contract two months after the commencement of the action, and a year after he had become fully advised of all the facts upon which his attempted rescission was based. There was nothing to explain the long delay and the defendant was held to be barred by laches. The facts are very remote from those alleged in the amended bill.

- (b) *Facts are pleaded which explain and excuse the slight delay.*

The special reasons for complainant's delay of three months are pleaded in the amended bill.

These reasons were:

- (a) That complainant had "paid in excess of \$300,000 upon the contract" (tr. fols. 20, 21).
- (b) That between October 1, 1912, and December 31, 1912, "complainant endeavored in every way by negotiations with said defendant, Angele Beaudry, and otherwise, to discover some means of enabling said Angele Beaudry, as such executrix, to complete her title" (tr. fol. 21) and "offered to extend the time when said executrix should be called upon under said contract to convey said claims to complainant in order that said defendant, Angele Beaudry, executrix as aforesaid, might in the meantime take such action as would enable her to fulfil the terms of said contract" (tr. fols. 21, 22).
- (c) That all of complainant's officers resided in Minneapolis; that complainant was obliged to send, and did send, one of its officers from Minneapolis to California "to ascertain whether any reasonable means existed of overcoming the defects in the title and for the purpose of negotiating with Angele Beaudry as above indicated" (tr. fols. 22, 23).

It is submitted that if excuses are necessary to explain complainant's delay of three months in rescinding, they are found in the foregoing facts recited in the amended

bill. The purpose of the rule of *laches* is not to prescribe precipitate haste as a rule of conduct for those desiring the equitable remedy of rescission. In the language of Sec. 1691 of the *Civil Code of California*, all that is required is the exercise of reasonable diligence. As is pointed out in *Quarg v. Scher, supra*, a party who has faithfully performed his part of a contract of sale and has heavily involved himself therein has a right to at least a moderate period for reflection before embarking in a course so fraught with dangers as rescission. And it is in rare cases that a complainant will be held barred by *laches* when his delay does not appear to have misled or injured the defendant in any manner whatsoever.

Complainant's conduct is shown to have been fair and diligent and free from any consequences injurious to defendant. We confidently submit that there is no precedent or reason for holding a delay of three months to constitute *laches* under the circumstances disclosed in the amended bill.

It is submitted that appellant cannot be charged with *laches*:

First, because appellant was not in a legal position to rescind earlier than October 1, 1912;

Second, because the short delay between October 1, 1912, and December 31, 1912, is excused by the facts pleaded in the amended bill.

III.

**Minor Objections Raised by Defendant to the
Amended Bill.**

In addition to the two main points which we have discussed, the motion to dismiss included a few minor objections. These grounds were not seriously advanced by defendant in the court below, nor were they noticed by the learned district judge in granting the motion. We therefore shall treat of them here very briefly.

**(1) IT DOES NOT APPEAR THAT COMPLAINANT DESPOILED
THE CLAIMS.**

Counsel made it a ground of the motion to dismiss that, while complainant was in possession of the claims, large quantities of gold were taken therefrom.

This point is made in the face of express allegations in the amended bill.

The actual facts of the matter are set forth as follows in the amended bill:

“that complainant and its predecessors in interest have further expended in the care and management of said properties, and in the operation of said mining claims, while in possession of said properties, and prior to the 1st day of December, 1911, further large sums which at all times have been and are largely in excess of any and all receipts from said operation.

That the gross receipts from the operation of said properties during the entire time when complainant and its predecessors in interest were in possession thereof, as aforesaid, did not exceed the sum of \$35,000.00; that complainant did not pros-

pect or mine upon or operate in any manner said properties after the 13th day of September, 1912, nor was any gold or anything else of value taken from said properties by complainant subsequent to said 13th day of September, 1912" (tr. fols. 11, 12).

It thus appears that no appreciable quantity of gold was taken from the claims during the entire period of complainant's possession and further that the claims were not worked by complainant at all after its right to rescind the contract accrued on October 1, 1912.

**(2) THE FACTS RESPECTING THE FAILURE OF TITLE ARE
PLEADED IN THE AMENDED BILL.**

Defendant's motion also attacked the amended bill upon the ground that it complains of the failure to give a "valid" title. It is claimed that in this regard the amended bill rests upon a mere conclusion of law as to what constitutes a valid title.

This objection is palpably without merit. Every detail of the proceedings leading up to the cancellation of Beaudry's claims is set forth in paragraph 8 of the amended bill.

**(3) ANGELE BEAUDRY IS A PROPER, IF NOT A NECESSARY,
PARTY-DEFENDANT TO THE AMENDED BILL.**

Angele Beaudry is sued in her individual capacity as well as executrix of the last will and testament of Frederic Beaudry. The claim is made that she is improperly joined as a party-defendant in her individual capacity.

It is alleged in the amended bill that besides being the executrix of Beaudry's will, she is also the sole legatee and devisee to all of his property. This being so, Angele Beaudry is at least a proper party-defendant to the amended bill.

(4) THERE IS NO MATERIAL VARIANCE BETWEEN THE ALLEGATIONS OF THE CLAIM AND THE AMENDED BILL.

In the court below the suggestion was made by counsel that the amended bill shows a variance from the allegations of the claim upon which it is based, in that the amended bill pleads facts showing complainant's right of rescission to have arisen not earlier than October 1, 1912, whereas the claim averred that the right to rescind arose "subsequent to the 1st day of March, 1912".

It is apparent that the former of these allegations is entirely consistent with the latter.

However, the difference in no event would amount to a material variance and it is only a material variance which can afford the basis over an objection of such a character. So long as the claim is based upon the same cause of action as the amended bill, there can exist no variance which in the eyes of the law will be deemed material. *Thompson v. Orena*, 134 Cal. 26; *Etchas v. Orena*, 127 Cal. 588; *Enscoe v. Fletcher*, 1 Cal. App. 659.

Summary.

I. THE CONTRACT CALLED FOR A VALID* TITLE TO THE MINING CLAIMS, NOT A MERE QUITCLAIM OF BEAUDRY'S INTEREST. IT DID NOT CALL FOR PATENTS, BUT IT DID CALL FOR VALIDLY LOCATED MINING CLAIMS, AS DISTINGUISHED FROM MERE PROSPECTS.

- (1) *The burden of showing the contract to be a contract for a quitclaim deed only rests upon defendant.*
- (2) *The contract contains covenants and language uniformly held to distinguish a contract for good title from one for a quitclaim deed:*
 - (a) the covenant "to give a good and sufficient deed" is always held to call for a good title;
 - (b) the recital as to Beaudry "being the sole owner of the claims" shows that good title and not a quitclaim was being bargained for;
 - (c) the covenant to convey "free and clear of all incumbrances" shows that the contract was for a good title and not a quitclaim.
- (3) *There is no express language in the contract, nor any feature of it, which indicates that it was an agreement for a quitclaim.*
 - (a) The expression common to most contracts for quitclaims, i. e.—that the vendor will convey "his right, title and interest" is not used in the contract.

- (b) The amount of money to be paid, coupled with the fact that the claims were non-productive, militates strongly against the reasonableness of the claim that complainant was bargaining for a quitclaim.
 - (c) The fact that in December, 1911, defendant exacted from complainant an agreement to pay the expenses of the contests indicates that under the agreement Beaudry was bound to pay them owing to his obligation to give a good title.
- (4) *Mining claims are real property. The same rules govern the construction of a contract for the sale of mining claims as for the sale of any other species of real property.*
 - (5) *The language used in the contract descriptive of the mining claims negatives the idea that mere prospects were in the minds of the parties.*

II. COMPLAINANT WAS NOT GUILTY OF LACHES IN RESCINDING.

- (1) *Complainant could not have rescinded before October 1, 1912, because:*
 - (a) The mere pendency of litigation adverse to the vendor's title does not enable a vendee to rescind;
 - (b) Under California law a vendor is not required to have title prior to the date when he is required to convey and it is only when his

title becomes "incurably defective by any ordinary methods of business negotiation" that his vendee is thereby enabled to rescind;

- (c) The title to the Long Gulch and Mule Creek Ridge claims became "incurably defective by any ordinary methods of business negotiation" when the Department of the Interior denied the petition for rehearing on September 13, 1912, and complainant first learned of this on October 1, 1912.
 - (d) The title to the Greenhorn claims became "incurably defective by an ordinary method of business negotiation" even later than October 1, 1912—in fact upon the very date of complainant's offer to rescind, December 31, 1912.
- (2) *The delay from October 1, 1912, to December 31, 1912, did not constitute laches, because:*
- (a) the time itself (three months) was short in view of the extent to which the contract had been executed and the size of the transaction;
 - (b) the short delay is excused by the facts pleaded in the amended bill.

III. THE MINOR OBJECTIONS TO THE AMENDED BILL ARE WITHOUT MERIT.

- (1) Complainant did not despoil the claims.

- (2) The facts showing the failure of title upon which complainant's right to rescind depends are pleaded in the amended bill.
- (3) Angele Beaudry, individually, is a proper, if not necessary, party defendant.
- (4) There is no material variance between the claim and the amended bill.

It is respectfully submitted that the District Court erred in granting the defendants' motion to dismiss the amended bill, and that the judgment should be reversed.

Dated, San Francisco,

November 5, 1914.

Respectfully submitted,

EDWARD J. McCUTCHEN,

WARREN OLNEY, JR.,

CHARLES W. WILLARD,

J. M. MANNON, JR.,

Attorneys for Appellant.

In the
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THE TRINITY GOLD DREDGING AND
HYDRAULIC COMPANY (a corpor-
ation),

Appellant,

vs.

ANGELE BEAUDRY, as executrix of the
last will and testament of Frederic
Beaudry, deceased, and Angele Beau-
dry, individually,

Appellees.

BRIEF FOR APPELLEES

THOMAS B. DOZIER,
Attorney for Appellees.

Filed this.....day of November, 1914.

FRANK D. MONCKTON, Clerk.

By.....

NOV 14 1914

Deputy Clerk.

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No. 2478

BRIEF FOR APPELLEES

An examination of the forty-three page Brief of the attorneys for the appellant has not caused us to change our views as to the correctness of the Order Granting Defendants' Motion to Dismiss the Amended Bill of Complaint.

We can not concur in the proposition that the Appellant's Amended Bill of Complaint sets up a cause

of action for the rescission of a Contract of Sale; and, on the contrary, we assert that the Amended Bill of Complaint utterly fails to set forth a cause of action for the rescission of the Contract of Sale, and discloses that the appellant was not entitled to rescind the contract upon any ground whatsoever.

The authorities which are cited and quoted in the Appellant's Brief are not applicable, with few exceptions, to the case at bar, and do not support the appellant in its contention that it was entitled to rescind the Contract of Sale.

The appellees contend:

First. That the appellant was not entitled, under the terms of the contract itself or otherwise, to rescind the Contract of Sale;

Second. That in attempting to rescind the Contract of Sale the appellant did not substantially comply with the rules governing rescission;

Third. That the appellant was guilty of laches in that it did not attempt to rescind promptly upon discovering the facts claimed by it to entitle it to a rescission of the Contract of Sale.

If the first proposition is determined favorably to the appellees' contention, then discussion or consideration of the second and third propositions becomes unnecessary.

The appellant bases its claim of right to rescind upon the failure of title to a portion of the *properties*

involved in the Contract of Sale; claiming that Beaudry undertook to convey perfect title to the ground or realty embraced within the boundaries of the mining claims. The appellant has cited numerous authorities in support of the proposition that the vendor, under an agreement to sell *land*, is required to convey to the vendee *title* to the *land* or *realty*, and that the vendor must have a valid *title* to the *land* which he agrees to convey. With this line of authorities we have no fault to find, because we believe they do state the general rules for the interpretation of contracts to convey *land* or *realty*; but we do assert that such authorities are not applicable to the question now before the Court and do not apply to contracts for the conveyance of *unpatented mining claims*.

The question for consideration is: What obligation rested upon Beaudry as to the conveyance of the unpatented mining claims; and what was the intention of both of the parties to the Contract of Sale of the properties enumerated?

We respectfully submit that, in so far as the unpatented mining claims are concerned, Beaudry never manifested any intention to convey the ground or the realty, but only agreed to convey his interest, which was a possessory interest, in and to each and all of the unpatented mining claims.

An examination of the agreement, as contained on pages sixty-seven to seventy-four of the Transcript

of Record herein, clearly discloses the fact that Beaudry was only bound to convey such title as he possessed, on the date the contract was executed, to the unpatented mining claims enumerated in the contract itself.

In order to convenience the Court in its consideration of this case we will quote from each part of the agreement where the properties are mentioned.

“The said Fred Beaudry, the party of the first part, being the sole owner and in possession of certain gravel mines together with the timber, the improvements thereon and fixtures . . . all located in Township 35 North of Range 8 West, Mount Diablo Base and Meridian, in Trinity County, Calif., including these certain mining claims and properties known as:

Minersville

No. 1.....160 acres more or less, patented

Minersville

No. 2.....160 “ “ “ “ “

Minersville

No. 3.....160 “ “ “ “ “

Red Gulch....140 “ “ “ “ “

Ridge160 “ “ “ “ “

Gassy Hill160 “ “ “ “ “

Head of Dig-

ger Creek...160 “ “ “ “ “

Diener160 “ “ “ “ “

Diener No. 2..160 “ “ “ “*unpatented*

Mule Creek

Ridge160 “ “ “ “ “

Long Gulch ...120 “ “ “ “ “

Connection ... 40 “ “ “ “ “

Sweet Gulch .. 160 acres more or less, *unpatented*
 Little Mule

No. 2.....160	"	"	"	"	"
Strope Creek .. 160	"	"	"	"	"
Little Mule ... 160	"	"	"	"	"
Greenhorn Flat 160	"	"	"	Receiver's Receipt	
Greenhorn Flat					

No. 2.....160	"	"	"	"	"
Taylor Gulch.. 160	"	"	"	"	"
Lane Gulch ... 160	"	"	"	"	"

containing a total area of 3160 acres more or less, of which 1260 acres have been patented by the United States Government.

"Now, therefore, Fred Beaudry, the said party of the first part, in consideration of one (1) dollar to him in hand paid, receipt of which is hereby acknowledged, does hereby grant to the said party of the second part an option to purchase the *above described mines and mining claims, lands and properties*, under the following conditions, to-wit:

"The party of the second part *will enter upon and take possession of the said properties*, except one house with furniture known as the Fourtlette House, yard and barn, and agrees and binds himself to expend not less than Ten Thousand (\$10,000) Dollars in improvements on said properties, in the following manner:"

(*Trans. of Record, p. 67-70.*)

"The party of the first part hereby *grants the right to use all of said properties except that above reserved for the purpose of prospecting, developing and working said mines, . . .*"

(*Trans. of Record, p. 70-71.*)

"It is further agreed by the party of the first part to at once upon request of said party of the

second part to make a good and-sufficient deed for all of said properties, free from all incumbrances,”

(Trans. of Record, p. 72.)

“Said party of the second part further covenants and agrees to pay all expenses for prospecting, examining the mines and the title of said properties.”

(Trans. of Records, p. 73.)

From the foregoing quotations, it will be easily discerned that no language was used, in the Contract of Sale, which imports an intention upon the part of Beaudry, when referring to the unpatented mining claims, to convey the lands or realty therein embraced. The agreement specifically states the condition of the several properties, and shows that some of the properties were patented by the United States Government, that upon others patent had been applied for, and upon still others that the claims were *unpatented* or merely *locations* upon mineral lands of the United States. There is nowhere expressed in the contract an obligation upon the part of Beaudry to patent the mining claims or locations or to perfect the pending applications for patent. In other words, the appellant was to take over the properties, if it did conclude to purchase them, in the same state and condition as they were in at the time the contract was executed.

The most careful investigation of the authorities has failed to disclose to us any decisions to the effect that, when a person undertakes to make a valid conveyance of an unpatented mining claim, he obligates himself to give a good, sufficient and valid title to the lands embraced within the boundaries of the mining claim or location. He does obligate himself, in such instances, to convey his right, title and claim to the possessory interest. The agreement itself discloses that both Beaudry and the appellant, in dealing with the unpatented mining claims, contemplated only such possessory interest as Beaudry held or had in the claims at the time the agreement was executed. The agreement refers to mining and personal property in which are embraced and included "*certain mining claims and properties.*" This language imports a distinction between the patented properties and the unpatented mining claims. The word properties, as used in the contract, was used in a general sense, but the character and present situation, nature of title and right of possession were expressly distinguished by the use of the words "patented" and "unpatented". The expression in the contract to the effect that "said party of the second part further covenants and agrees to pay all expenses for prospecting, *examining* the mines and the *titles* to said properties" demonstrates that the party of the second part, appellant herein, was to investigate the pos-

sessory title of Beaudry to the unpatented mining claims. Again, the contract provided that Beaudry was "at once upon request of the said party of the second part to make a good and sufficient deed for all of said properties, free and clear of encumbrances, with escrow instructions in accordance with the above stipulations and place the same in some bank in San Francisco or elsewhere agreed by both parties"; and that the appellant was to enter upon and take possession of the said properties for the purpose of examining, prospecting and working the same. It can scarcely be contended that any person, in possession of his faculties, would enter into a contract to convey mining properties as realty and land, included in which were unpatented mining claims, and then put it out of his power to reduce the unpatented mining claims to actual ownership of land and realty, by giving the proposed vendee exclusive possession of the properties. Yet, if the contention of the appellant was sound, this is exactly what Beaudry obligated himself to do, because the appellant was to have the immediate and exclusive control of the properties and of each of them and all of them and was to do and perform the annual assessment work upon the unpatented or possessory right mining claims. Such construction would permit the appellant to fail to do the annual assessment work for some year upon one or more of the unpatented claims; and, after having

exhausted the soil of its mineral value, attempt to rescind the contract and come into Court attempting to enforce a rescission upon the ground that title to one or more of the unpatented claims had failed. It must be borne in mind that the products of the mining properties were to belong exclusively to the appellant and that it had the right to work each and all of said properties, including the mining claims, in such manner as its judgment might determine. The use of the expression contained in the contract that the appellant was to examine the title of the properties is significant, when considered in connection with a statement of the status of the titles; the only practical way of examining the titles to unpatented mining claims is to ascertain whether or not the location has been made upon mineral land of the United States in accordance with the laws of the United States and the rules and regulations of the General Land Office. Title to a possessory interest in an unpatented mining claim is not the same as title to real estate or realty where the same is represented to be or is actually held in fee. The title to an unpatented mining claim or location is a right to the use and enjoyment of a particular piece of the Government domain, mineral in character, which has been located and is held in harmony and compliance with the laws and rules governing claims upon the government domain. The authorities all hold that a purchaser of an unpatented min-

ing claim can only acquire, by such-purchase, such title or right as his vendor had *at the time of the sale*. Beaudry did not guarantee the value of the unpatented mining claims for gold or precious mineral products, but expressly allowed the appellant to take the exclusive possession of said properties for the very purpose of ascertaining and determining such values. It is nowhere alleged in the Amended Bill of Complaint that the mining claims were not located upon mineral lands belonging to the government of the United States and that such locations were not made in accordance with the laws of the United States and the rules and regulations of the General Land Office; and if the mining claims in question were so located and had been so held by Beaudry up to the time that he executed the agreement on the twenty-first day of July, 1906, it follows that he only obligated himself to convey such title as he then possessed, possessory in its nature, to the unpatented mining claims. If the Government refused to issue a patent for the mining claims upon the ground that it was not shown that they were chiefly valuable for mineral purposes, or that their mineral character had not been sufficiently demonstrated, it does not follow that Beaudry was bound in any respect to convey to the appellant the land or realty embraced within the boundaries of the claim or that he had guaranteed that patent could be secured, or would be secured, upon application therefor. However, if there should

prove to be any ambiguity or uncertainty as to the intent and purpose of the contracting parties, when dealing with the unpatented mining claims, such ambiguity and uncertainty is entirely removed when we come to consider the language contained in the Supplemental Agreement dated December 11th, 1909, and which is found on pages ninety and ninety-one of the Transcript of Record. Again, for the convenience of the Court, we quote such language:

“It is further stipulated and agreed, that the party of the second part is to pay all expenses, fees, charges, and costs in connection with the decisions in the United States Land Office at Redding, California, and upon any appeal of the same to the Commissioner of the General Land Office, or the Secretary of the Interior, in the matter of application for patent of the Greenhorn Placer Mining Claims; said contests being now pending in the United States Land Office at Redding, California;

“And it is further stipulated that the party of the second part is to do and perform on each, every and all of the *unpatented placer mining claims*, mentioned and particularly set forth in the contract of agreement of July 21st, 1906, the annual assessment work, labor and improvements, required by law, and the rules and regulations of the Department of the Interior, to be done and performed upon placer mining claims in order to hold and maintain the possessory right and title thereto; said labor and improvements to be furnished, done and performed, at the sole cost, charge and expense of the party of

the second part, and without any charge, cost or expense to the party of the first part."

This language clearly conveys the intention of both of the parties when dealing with the unpatented mining claims or locations. If it had been intended that Beaudry was to convey valid title to the realty and land, embraced within the mining locations, the contract would have provided that he was to acquire title thereto and cause patent to be issued therefor and to do and perform such things as were necessary to be done in order to put him in the position of being able to convey a valid title to land and realty. On the other hand, we discover that the appellant was to do and perform these things at its own cost, charge and expense, that it was to develop and work the mining claims so that patent therefor could be issued and sufficient proof made. The facts that the government, upon application for patent, refused to issue the same and that the property was, after the date of the contract, included within the Forest Reserve, do not, in any wise, alter the purpose and intent of the agreement or impose any new or additional obligations or duties upon Beaudry.

The appellant was in possession of the properties, knew their condition, could ascertain their value as mining properties and the status of the title to each and every claim. As far back as the tenth day of September, 1908, the appellant knew that certain proceedings adverse to the application for patent had

been instituted by the government; and yet the appellant remained in possession of the properties, continued to work and operate the same, and made partial payments for and on account of the purchase price and in all respects kept alive the option and the right to purchase the properties.

(Trans. of Record, p. 15.)

As far back as May 25th, 1910, there had been an adverse decision of the Register and Receiver of the Land Office at Redding in relation to the mineral character of some of the lands, and the said Register and Receiver adjudged that the mineral character of the land included in the Long Gulch Placer Mining Claim had not been sufficiently established. Notwithstanding this adverse ruling there was no attempt upon the part of the appellant to rescind the contract and neither was there any claim asserted by the appellant that Beaudry's title to the said mining claims had failed. On the contrary, the appellant continued in the possession of the properties, secured extension of time for payment and paid large sums of money although these facts were clearly within its knowledge.

(Trans. of Record, p. 16.)

The appellant lays stress upon the proposition that Beaudry in the contract of July 21st, 1906, used the expression that he was "the sole owner and in possession of certain gravel mines, * * * * * in-

cluding these certain mining claims and properties." The expression "sole owner" was clearly used in its general sense and meaning and was not intended to declare that he was the owner in fee of the lands and realty embraced within the unpatented mining claims, because the subsequent provisions of the contract set forth definitely and descriptively the nature and character of his ownership and show that his ownership in a portion of the properties was qualified. It is apparent that Beaudry used the expression as it is usually and generally used in connection with the purchase and sale of unpatented mining claims; and the authorities show that the holder of a possessory right in unpatented mining claims is justified in referring to himself as the owner. The course of legislation and the decisions in the State of California have recognized a qualified ownership in unpatented mining claims.

State v. Moore, 12 Cal., 56.

"Persons claiming and in the possession of mining claims upon the public lands of the United States are, as between themselves, and all other persons except the United States, owners of the same, having a vested right of property founded on their possession and appropriation of the land containing the mine."

Hughes v. Devlin, 23 Cal., 502.

"Claims to public mineral land are recognized as titles in this State—as legal estates of free-

hold, for all practical purposes—if we except some doctrine of abandonment, not, perhaps, applicable to such estates.”

Merritt v. Judd, 14 Cal., 60.

The word “claim” in mining parlance, when employed as a noun, has a definite and particular meaning, denoting a particular piece of ground to which that miner has a recognized, vested and exclusive right of possession for the purpose of extracting precious metals therefrom.

Northern Pac. Ry. Co. v. Sanders (U. S.) 49 Fed. 129, 135; 1 C. C. A. 192.

“‘Mining claim’ is the name given to the portion of the public mineral lands which the miner for mining purposes takes up and holds in accordance with mining laws, local and statutory. It is not merely a vein or lode, but with that a certain quantity of surface ground.”

Mt. Diablo Mill and Mining Co. v. Callison (U. S.) 17 Fed. C. A. S. 919, 924;

Morse v. De Adro, 40 Pac. 1018, 1019; 107 Cal., 622.

Williams v. Santa Clara Mining Co., 66 Cal. 193;

Salisbury v. Lane, 63 Pac. 383, 384; 7 Idaho, 370.

“A mining claim is an estate of inheritance and subject to dower.”

Black v. Elkshorn Mining Co. (U. S.) 49 Fed. 549, 550.

“A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold and conveyed, and will pass by descent.”

Sullivan v. Iron Silver Mining Co., 12 Sup. Ct. 555, 556; 143 U. S. 431; 36 L. Ed. 214.

From the foregoing authorities it will be seen that when Beaudry entered into the contract of July 21st, 1906, he referred to the *unpatented* mining claims in the same sense in which the phrase “mining claim” is usually and generally employed and commonly understood. We think it can not be seriously contended that Beaudry, in using the language contained in the agreement to the effect that he was the sole owner, etc., intended, or the appellant understood, that he was to give to the appellant, in case the properties were purchased, a title to the ground or land comprised within the boundaries of the *unpatented* mining claims.

The strongest construction which can be placed upon the language so used, when referring to the *unpatented* mining claims, is that Beaudry represented he had valid locations upon mineral land of the United States in a certain designated portion of

Trinity County; and that he would convey such rights as he possessed to said mining claims, provided that the appellant was satisfied, after investigation and research, with the value of the same for mineral purposes and with the title thereto.

The very words "mining claim" import purely a possessory interest and that the same is not held in fee and that the same has not been patented; because when the land has been reduced to ownership in fee and the ground has been patented, it ceases to be a mining claim and becomes patented mining ground, realty or land.

"The purchaser of a mining claim can only acquire, by such purchase, such title or right as his vendor had *at the time of the sale*."

Waring v. Crowe, 11 Cal., 367.

"The purchaser of a mining claim or public mineral land acquires what title the vendor had *at the moment of the sale*."

27 Cyc. 678, and cases cited thereunder.

"The words 'mining ground', when used in a deed have a technical meaning; and refer to that interest which a mere occupant of a mine has in the same; they are not the words used when a fee simple or leasehold interest in real estate is to be conveyed."

27 Cyc. 678, and cases cited thereunder.

We quite agree with the attorneys for appellant in their statement found on pages nineteen and twenty

of the Brief for Appellant, where they say that it is evident that they, meaning the parties to the contract of July 21st, 1906, used the term "mining claims" as contradistinguished from the physical properties themselves; and we also agree with the attorneys for appellant that the term "mining claims" was obviously intended to cover something in addition to what had already been covered by the term mines. The attorneys for appellant have unwittingly stated our exact position. It is obvious that both parties understood that they were dealing with lands and mines which had been patented and in which the fee was vested in Beaudry and were dealing with unpatented mining claims in which the fee was not vested in Beaudry and in which he only had and held a possessory interest. Appellant contends that had the parties intended to deal with mining prospects represented merely by Beaudry's possession, the recitals as to whether the claims were patented or unpatented would have been unnecessary and immaterial. How this conclusion can be reached is not apparent to us. It was the fact that the parties were dealing with unpatented mining claims as well as patented lands that necessitated and rendered very immaterial the use of the descriptive adjectives. Had the parties been referring only to patented lands to which Beaudry held the fee and had not been dealing with unpatented mining claims, then the use of the descriptive

adjectives would have been entirely unnecessary and immaterial. A person purchasing unpatented mining claims or locations is presumed to deal with the situation as he finds it. It is presumed that he knows and understands that the only right which the proposed vendor has in unpatented mining claims is a possessory right; that is the right to use and occupy the ground, comprehended within the boundaries of the claim, to extract the gold and other precious metals therefrom, and to use and enjoy the particular land located as long as he shall comply with the laws and rules applicable to mining claims and keep alive his possessory interest. Just such matters were in the minds of the parties to the contract of July 21st, 1906, when they inserted the following language in the instrument, to-wit:

“It is hereby granted to the said party of the second part an option to purchase the above described *mines and mining claims, lands and properties.*”

That such ideas were in the minds of the parties is manifest when we come to consider that the parties were dealing with actual mines, with other lands, with personal property and with *mining claims*. If the parties had held any other intention all of the properties in question would have been referred to by government subdivisions or other particular description and designation and all use of descriptive

adjectives would have been useless and superfluous

The appellant knew the condition of the properties knew that there were mining claims and possessory interests involved in the contract of option and went into possession of the properties for the very purpose of investigating the said properties as to their mineral value and as to the validity of title. The decisions of this and other states and of the United States Courts hold that when persons are dealing concerning mineral claims and mineral property that they must be presumed to contract with reference to the facts known to both. A contract to convey unpatented mining claims is in many respects entirely dissimilar from a contract to convey realty or land which is held in fee. It would be a very peculiar state of the law to hold that when one contracted to convey a mining claim, which was located upon mineral ground of the United States that he had contracted to convey the fee title to the property or that he had guaranteed the mineral character of the same. A mining claim is validly located when a discovery of a ledge is made or of rock in place bearing gold, silver, or other precious metals, and the location is made upon mineral land of the United States, the end lines and corners established, notice posted, etc. The same general rules apply to placer ground; that is, when a location is made upon mineral ground of the United States and the ground is found to be composed of auriferous

gravel, or of soil or earth bearing gold and other precious metals. It would be an entirely different proposition, perhaps, if location was attempted upon non-mineral ground belonging to the United States; but in this case there is no such contention because the mining claims in question were located upon mineral land belonging to the government of the United States. Beaudry made no guarantee as to the value of the placer claims or the extent to which they carried auriferous gravel or gold bearing earth or soil.

“An option on, or contract for the sale of, mineral property is construed so as to carry into effect the intentions of the parties, according to the general rules applicable to such contracts, and the *parties must be presumed* to have contracted with respect to the *facts known to both*, and the contract will be construed accordingly.”

27 Cyc., 672 and cases cited.

If such be the situation, then the case of La Grange Inv. Co., v. Shaw, 72 Pac. 795, cited by appellant in its Brief is not at all applicable. In that case fraud was claimed and the whole contest centered upon the defendant's allegations of misrepresentations and fraud in inducing him to sign the contract. It is difficult to determine from a reading of the case what were the exact facts, but it does appear that the plaintiff represented that it was the owner of an undivided half interest in the quartz and placer mining claims

purporting to be described in the deed placed in escrow; that it was the owner of a contract, the same being a contract for the title to the other undivided one-half interest in and to all of said mining claims, and that each and all of said claims were good and *valid locations of mining claims, upon lands subject to said location*—that is to say, that each of said quartz claims contained a vein of quartz in place, bearing gold or other precious metals; that said vein had been discovered within the boundaries of each of said mining claims, and that each had been duly and regularly located, and the proper record made thereof, and that the placer mining claims mentioned and described were good placer locations, *made upon mineral ground*. It appears that the locations were not made upon mineral ground and that there were other false and fraudulent representations. Such being the situation, we do not see where appellant can obtain any consolation from the case which it has cited and which appears to be the only case cited by it in connection with the law applicable to mining claims. There is absolutely no parallel between the case of *La Grange Inv. Co. v. Shaw*, *supra*, and the case under consideration by the Court.

Appellant seems to have entirely lost sight of the proposition that it had an option to enter in and upon the properties on and after July 21st, 1906, for the purpose of prospecting, developing and working the

said properties and that no payment was to be made for or on account of purchase price until August 10th, 1907, when the sum of Ten Thousand Dollars was to have been paid. In other words, Beaudry gave to the appellant, or to its predecessors in interest, the right to enter in and upon the properties and each of them and all of them, examine, prospect and develop the same and ascertain their value for mineral purposes and also to examine the mines and the title thereto; which right continued for the period of more than one year before any payment was to be made for and on account of purchase price. The appellant, and its predecessors in interest, well know the conditions and had an opportunity to prospect and examine the title to the properties and to examine and investigate the title to the mining claims; and did enter upon the properties and did carry on such investigations for a period of more than one year before any payment was to be made on account of purchase price. During this year the appellant must have satisfied itself that the properties were valuable for mining purposes and that the title of Beaudry to the mining claims was a good possessory title. Otherwise they would not have made the first payment on account of purchase price and converted the option contract into one of sale and purchase. Furthermore, the appellant entirely overlooks the proposition that it was never disturbed in the use and occupation of the min-

ing claims and any of them and that the government did not, by the ruling of its Department, deprive it of any beneficial interest in the mining claims in question. The refusal to issue patent until it was demonstrated that the lands in question were more valuable for mineral than for other purposes does not become an element in the case. In every instance, where patent is applied for, proof must be made that the land sought to be secured from the Government is chiefly valuable for mineral. The appellant could have exhausted the mineral contained in the soil of the mining claims and it would then have become impossible for either Beaudry or the appellant, or any one else, to have secured title to the ground as mineral or placer land; yet the appellant could have derived all of the beneficial interest accruing from the working of the ground as hydraulic or placer ground.

It is extremely significant that no fault was found with the situation until the executrix of the last will and testament of Frederic Beaudry demanded the payment of the last installment of purchase price; and then, and only then, and upon the day preceding the date when last payment was due, the appellant undertook to rescind the contract on the ground that title to some of the mining claims or locations had failed. The fact that Beaudry, or his executrix, expressed the hope and belief that patent to the mining claims could be ultimately secured, does not in any-

wise change the situation or impose any new or additional obligations upon Beaudry or his executrix. It is reasonable to suppose that Beaudry believed that patent would be ultimately secured to the mining claims, when the same had been developed, for the reason that he had secured patents to a large number of acres of government ground lying in the same district, contiguous to and practically a part of the ground comprised within the mining claims or locations. Finally, the appellant having satisfied itself with the character of the properties in question, having determined to its satisfaction the mineral value thereof, and having determined to its satisfaction the title of Beaudry to each and all of the properties mentioned in the contract, and having converted the option into a contract of sale and purchase, can not now, after many years have elapsed and it has had possession of the property, extracted the values therefrom and used it as its own in every respect, be heard to say that it is entitled to rescind. Such determination, we respectfully submit, would be inequitable and unjust. The appellant was given its full year, full measure of time, in which to determine whether or not it wished to take over the properties of Fred-eric Beaudry as they stood, title and mineral character included, at the date of the contract of July 21st, 1906.

We believe that this Honorable Court will determine from the conditions which attain in this particular case that the appellant was not entitled to rescind its contract and that it is not entitled to have declared upon the property of the Deceased an equitable lien for Three Hundred and Four Thousand, One Hundred and Sixty-nine Dollars, with interest, etc.

We now proceed to consider the second proposition; that is, in attempting to rescind the contract did the appellant substantially comply with the rules governing rescission? We submit that the appellant did not comply with the rules governing rescission of contracts, in any substantial respect. The rules are very simple and easily understood.

A person desiring to rescind a contract must do so promptly, upon discovering the facts which entitle him to rescind; he must restore to the other party *everything* of value which he has received from him under the contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so. In other words, he must make an unqualified offer to restore everything of value which he has received under the contract, without any qualifications or limitations other than that the second party shall do likewise. No such offer was made by the appellant. It had been in possession of the mining properties, extracted gold and other precious metals

therefrom, and was, at the time of the commencement of this suit, in the possession of the properties and each of them and all of them. It claims to have paid in excess of Three Hundred Thousand Dollars upon its contract with Beaudry in direct cash payment and in moneys expended under said contract in the development of said mining claims, but it does not appear what amount of gold or other precious metal had been extracted from the properties by the appellant. On the thirty-first day of December, 1912, the appellant caused to be served upon the defendant, Angele Beaudry, as executrix of the last will and testament of Frederic Beaudry, Deceased, and as sole devisee under the said last will and testament of said deceased, a Notice of Rescission wherein and whereby the appellant notified the said Angele Beaudry, as such executrix and as such devisee, that it did rescind the said contract of July 21st, 1906, because of such failure of consideration and did offer to restore to the said Angele Beaudry, as said sole devisee, and as said executrix, everything of value which had been received under the said contract, upon condition that the said defendant, Angele Beaudry, as such devisee and executrix, do likewise; but the appellant did not stop there. It immediately proceeded to qualify its offer of rescission and of restoration, and did provide that the amount to be paid to it by Angele Beaudry, as such executrix and such devisee, was to be the sum

of Two Hundred Thousand Dollars, provided that said offer was accepted on or before the sixth day of January, 1913; otherwise, that the appellant demanded as a condition for the restoration of the property of Frederic Beaudry, that Angele Beaudry, as such executrix or such devisee, should pay such additional sums as the appellant might be entitled to. The offer to rescind does not indicate that the appellant was either able or willing to restore all that it received of value. There is no statement of the amount of gold or other precious metal extracted by it from the soil of the properties. There is a demand that there be repaid to the appellant all of the moneys expended by it in the working and development of said property. Certainly neither Beaudry nor his estate was under any obligation to return to the appellant, even if rescission was warranted, anything more than the money he had received on account of purchase price and the sum of Ten Thousand Dollars which were expended for improvements of a definite character and kind, as per the terms of the contract. The property was not in a condition to be restored to the estate of Beaudry, because the appellant, and its predecessors in interest, had worked and mined the property from July 21st, 1906, up to and including the date that rescission was offered. The appellant and its predecessors in interest had mined the property for a period of six years and a half, and had been

in possession of the very mining claims concerning which this controversy exists. The facts stated in the Amended Bill of Complaint show that appellant had despoiled and changed the property, so that it was unable to restore it, and therefore was not in a position to rescind, and has no action in equity.

Bailey v. Fox, 78 Cal., 389, 397;

Civil Code of Cal., Sec. 3407;

Civil Code of Cal., Sec. 1691, Subdivision 2.

“Where a party can not or does not restore the other party to the condition he would have been in but for the contract, rescission is not allowable.”

Jones v. Bay Cities, etc., Co., 22 Cal. App. Reps. 81.

By continuing to act under contract until the executrix demanded payment of the balance of the purchase price and by continuing to take the gold out of the soil for several months after knowledge of all facts regarding conditions of title, appellant waived all right to rescind, and by its laches lost all right to rescind, if any it ever had.

Civil Code of Cal., Sec. 1691;

Burke v. Levy, 70 Cal., 250, 254;

Bailey v. Fox, 78 Cal., 389;

McGue v. Rommel, 148 Cal., 539;

93 U. S. 55;

192 U. S. 252.

The facts stated in the Amended Bill of Complaint clearly show that it was never the intention of the appellant to rescind because of the rulings of the Department of the Interior concerning the mining claims, and that rescission was an after thought, the offer to rescind not having been made until demand had been made for the payment of the balance of purchase price.

(*Trans. of Record*, pp. 30, 31, 32 and 33.)

The appellant did not rescind promptly upon discovering the facts which it claims entitled it to rescind.

The very fact upon which the appellant bases its right to rescind was fully known to it on the first day of October, 1912, and as a matter of truth was practically known to the appellant for several years prior thereto. Notwithstanding the absolute knowledge of appellant, it continued in possession of the properties, continued to mine the same and extract gold and minerals therefrom and exercise full acts of dominion thereover. From the first day of October, until the thirty-first day of December, the appellant remained absolutely silent, made no effort to rescind, asserted no claims against the estate of Frederic Beaudry, Deceased, continued in the possession of the property, carried on and conducted its mining operations, and never once suggested that it was entitled to rescind or that any circumstances had developed which entitled

it to a rescission. And it was not until notice had been served by the Executrix of the Estate of Frederic Beaudry, Deceased, that she would require the final installment of purchase price to be paid on the first day of January, 1913, that any action was taken by the appellant, and then no action was taken until the thirty-first day of December, 1912. The only excuse offered by the appellant for its failure to rescind promptly is that no officers of the Corporation were present in the State of California until about the twenty-second day of December, 1912. It was not necessary for any officer of the Corporation to be in California in order to offer a rescission, and it was not necessary for any officer of the Corporation to be in California in order to accomplish a rescission. Offers to rescind, as was the fact in this instance, are usually in writing, and it does not appear that there was any difficulty presented to the appellant in writing to the Executrix or telegraphing to the Executrix to the effect that the agreement or contract of July 21st, 1906, was rescinded by reason of the failure of title to some of the mining claims. Absolutely, no reasonable or valid excuse is offered for the failure of the appellant to rescind promptly upon discovering the facts entitling it to rescission. The appellant could not gamble with the situation; it could not wait to ascertain whether or not the Executrix of the Estate of Frederic Beaudry intended to

demand the final payment. The whole course of conduct of the appellant indicates most strongly that its action was taken solely because demand had been made for the final payment. The very nature and character of the property involved demanded the utmost good faith upon the part of the appellant and the utmost promptness in rescinding the contract. This rule has been repeatedly laid down and adhered to concerning contracts applicable to mining claims and mining property.

“The Answer alleged laches on the part of Plaintiff, as a bar to the right to rescind. The finding was that the plaintiff was not guilty of laches in demanding rescission or in bringing the suit. We think this finding is contrary to the law and the evidence. A person having a right to rescind must make the offer promptly, upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence or disability, and is aware of his right to rescind.”

Garstang v. Skinner, 165 Cal., 727;

Barfield v. Price, 40 Cal., 542;

Burkle v. Levy, 70 Cal., 254;

Bailey v. Fox, 78 Cal., 389;

Harrington v. Patterson, 124 Cal., 542.

“A prompt disaffirmance of a contract by one entitled to rescind upon discovery of the facts entitling him to rescission, is essential. If he fails to act promptly, and continues to treat the contract as binding, he will be held to have

waived his right to rescind and to have elected to affirm the contract.

"Whether a person entitled to rescind has acted promptly is a question to be decided by the Trial Court upon the facts of the particular case. The evidence in this case is of such a nature as to support a conclusion that the vendee, with full knowledge of the facts, was not ready to end the contract, and that, continuing to treat the same for his own purpose as valid and binding, he failed to make known any desire to terminate the contract for such a length of time and under such circumstances as to preclude the exercise by him of any right of rescission."

Cross v. Mayo, 167 Cal., 594.

We do not address ourselves to the authorities contained in Appellant's Brief, on the question of rescission, for the reason that in general they state the law, but they do not modify any of the rules regarding rescission which we have heretofore set forth. The statement that the appellant endeavored in every way, by negotiations with the appellee, Angele Beaudry, to discover some means of enabling said executrix to complete the title, which is offered by the appellant as an excuse for its delay in offering to rescind, is absolutely absurd when we come to consider that the appellant alleges in its Amended Bill of Complaint that it knew on the first day of October, 1912, that it would be impossible for the title to said properties to be perfected. This statement is merely offered as an excuse, and is not a reason for the appel-

lant's action. Especially should promptness and expedition be shown when the rescission is claimed against the Estate of a deceased person, which estate is in course of probate. The law requires the utmost promptness in relation to the presentation of claims and the assertion of rights against the estates of deceased persons. The appellant well knew that the executrix could not act upon the offer of rescission without the consent and approval of the Court and after certain proceedings had been instituted and orders obtained by which the executrix would be able to act upon the question of rescission.

Finally, we respectfully submit that the appellant in its Amended Bill of Complaint, has failed to disclose that it has been injured, or damaged, or sustained loss, in any respect; and it does disclose that it had possession of the properties and all of them, with a right to remove the gold and other precious metals and enjoy the entire beneficial use thereof. There is no showing or claim that the appellant was ever disturbed in its possession, or will ever be disturbed. The rulings of the Department of the Interior did not in anywise seriously or injuriously affect the appellant. Each and every one of the mining claims could be worked and operated by it and the gold extracted therefrom; it was entitled to all of the use and enjoyment of the property, as much and as fully as it would have been able to use and enjoy the

property had patent been issued therefor; especially in so far as it applies to the working and operation of the property for placer mining and hydraulic purposes. Having used and enjoyed the property for a period of six years and upwards, having had complete and undisturbed possession thereof, having carried on and conducted mining operations and extracted the gold and values therefrom, having known the conditions in relation to some of the unpatented claims, having secured extensions of time for the payment of installments of purchase price, having converted the option into a contract of purchase and sale, with full knowledge of conditions as to mineral value and title, having the complete control of the mining claims and locations and being charged with the duty and responsibility of developing the same and performing the assessment work and making the improvements thereon, having waited for a long period of time after having discovered each and every fact claimed by it to entitle it to a rescission; nevertheless, the appellant now endeavors, because it was called upon to make final payment of purchase price, to rescind the contract and to return to the Estate of Frederic Beaudry a property which has been worked by the appellant, according to its own methods and manner, whether wisely or unwisely, and whether the values have been entirely extracted or not, and seeks to enforce an equitable claim and claim against the estate of a de-

ceased person in an amount upwards of Three Hundred Thousand Dollars.

We respectfully submit that there is nothing in the Amended Bill of Complaint which shows that the appellant is, or ever was, entitled to rescind the contract, or which shows that it was ever unfairly or unjustly dealt with; and there is not the slightest charge of fraud against the deceased or his executrix, but, on the contrary, there is every showing that the appellant was placed in a position to make such investigations of title and character of land as would enable it to satisfy itself and determine the advisability of making the purchase.

Such being the conditions, we respectfully submit that the District Court did not err in granting appellee's Motion to Dismiss the Amended Bill, and we further submit that the judgment should be approved.

Dated; San Francisco, Cal., Nov. 14th, 1914.

Respectfully submitted,

THOMAS B. DOZIER,

Attorney for Appellees.

No. 2479

United States
Circuit Court of Appeals
For the Ninth Circuit.

J. PAUL THOMPSON,

Appellant,

vs.

EMMETT IRRIGATION DISTRICT and W. H.
SHANE, N. B. BARNES and E. J. REY-
NOLDS, as Directors, and R. B. SHAW, as
Treasurer, of EMMETT IRRIGATION
DISTRICT,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court
for the District of Idaho,
Southern Division.

Filed

NOV 5 - 1914

F. D. Menckton,

Clerk.

No. 2479

United States
Circuit Court of Appeals
For the Ninth Circuit.

J. PAUL THOMPSON,

Appellant,

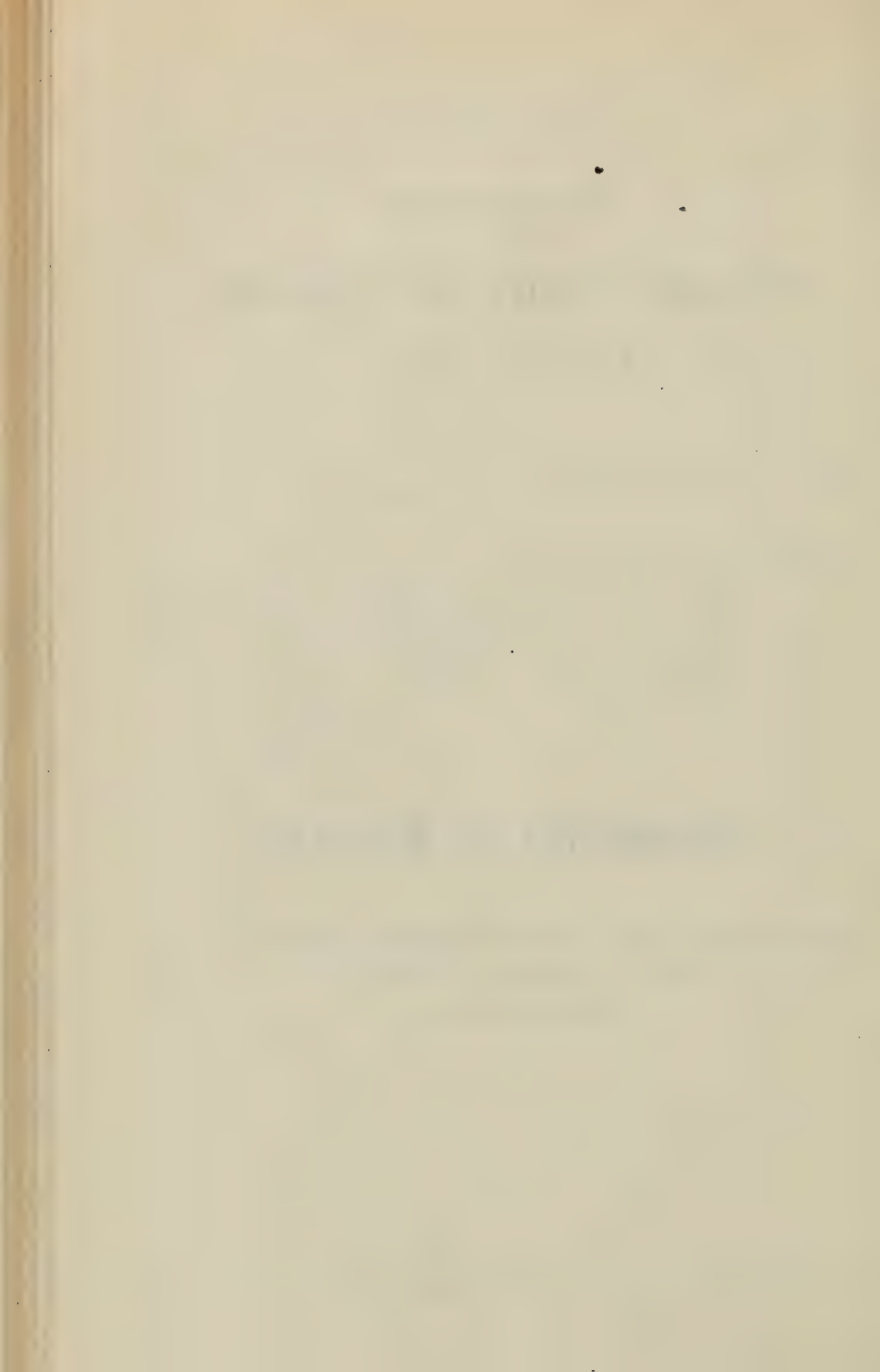
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EMMETT IRRIGATION DISTRICT and W. H.
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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Amendment to Bill.....	23
Assignment of Errors.....	40
Attorneys of Record, Names and Addresses of.	1
Bill of Complaint.....	1
Bond on Appeal.....	45
Certificate of Clerk U. S. District Court to Transcript of Record	49
Citation on Appeal (Original).....	47
Decision on Motion to Dismiss Complaint as Amended....	31
Decree Dismissing Bill	39
Motion to Dismiss Bill of Complaint as Amended	27
Names and Addresses of Attorneys of Record...	1
Opinion	31
Order Allowing Appeal.....	44
Petition for Appeal	43
Return to Record.....	48

[Names and Addresses of Attorneys of Record.]

Messrs. RICHARDS & HAGA, McKEEN F. MORROW, Boise, Idaho,

Attorneys for Appellant.

Messrs. WOOD & DRISCOLL, Boise, Idaho, J. M. THOMPSON, Caldwell, Idaho,

Attorneys for Respondents.

*In the District Court of the United States, for the
District of Idaho, Southern Division.*

IN EQUITY—NO. —.

J. PAUL THOMPSON,

Plaintiff,

vs.

EMMETT IRRIGATION DISTRICT, a Municipal Corporation, W. H. SHANE, N. B. BARNES, and E. J. REYNOLDS, as Directors, and R. B. SHAW, as Treasurer of said EMMETT IRRIGATION DISTRICT,
Defendants.

Bill of Complaint.

To the Honorable, the Judge of the District Court of the United States for the District of Idaho, Southern Division:

J. Paul Thompson, a citizen of the State of Ohio, residing in the City of Cleveland, said State, brings this his Bill of Complaint against the Emmett Irrigation District, a municipal corporation organized under the irrigation district laws of the State of

Idaho and situated in Canyon County, said State, and W. H. Shane, N. B. Barnes, and E. J. Reynolds, as Directors of said Emmett Irrigation District, and R. B. Shaw, as Treasurer of said District, all residents and citizens of the State of Idaho residing in Canyon County, State of Idaho; and thereupon your orator complains and says:

I.

That your orator is a citizen and resident of the State of Ohio residing in the City of Cleveland, said State of Ohio. [1*]

II.

That the defendant Emmett Irrigation District is a municipal corporation organized and existing under the laws of the State of Idaho providing for the organization of irrigation districts.

III.

That the defendants W. H. Shane, N. B. Barnes and E. J. Reynolds are the duly elected, qualified and acting Directors of the said Emmett Irrigation District and constitute the Board of Directors of said District, and they are citizens and residents, and each of them is a citizen and resident of the State of Idaho, residing in Canyon County, said State.

IV.

That the defendant R. B. Shaw is the duly appointed, qualified and acting Treasurer of said Emmett Irrigation District and is a citizen of the State of Idaho residing in Canyon County, said State.

V.

That the matter in controversy in this suit, ex-

*Page-number appearing at foot of page of original certified Record.

clusive of interest and costs, exceeds the sum or value of \$3,000.00, and is wholly between citizens of different states.

VI.

Your orator further shows that the said Emmett Irrigation District was organized on or about the 13th day of September, 1910, under and pursuant to an act of the Legislature of the State of Idaho, entitled, "An act relating to irrigation districts and to provide for the organization thereof, [2] and to provide for the acquisition of water and other property and for the distribution of water thereby for irrigation purposes, and for other and similar purposes," approved March 9th, 1903, and the acts amendatory thereof and supplemental thereto, the same being known as Title 14 of the Political Code of the State of Idaho; and that thereafter and on or about the 2d day of November, 1910, the Board of Directors of said District at a meeting thereof duly and legally held for such purpose, proceeded to determine the amount of money necessary to be raised for acquiring the works, water rights and property and carrying out the plans theretofore formulated in the manner provided by law for furnishing and supplying water for the irrigation of the lands within said Emmett Irrigation District; that said Board at said meeting determined that the sum of One Million One Hundred Thousand Dollars (\$1,100,000.00) was the amount of money necessary to be raised for acquiring the works and water rights and carrying out the plans so formulated and deemed necessary for irrigating the lands within said District; and there-

upon and on said 2d day of November, 1910, the said Board called a special election to be held in said District on December 3d, 1910, at which election there should be submitted to the electors of said District, possessing the qualifications prescribed by law, the question whether or not the bonds of said District in the amount of One Million One Hundred Thousand Dollars (\$1,100,000.00) should be authorized; that notice of such election was given by posting and publication for the time and in the manner required by the statutes of Idaho relating to such matters, and at such election one hundred and eight (108) votes were cast, all of which were "Bonds—Yes," and no votes were cast "Bonds—No," and on the 6th day [3] of December, 1910, the said Board of Directors canvassed the returns of said election as aforesaid and declared the bonds of said District authorized for the sum and in the amount of One Million One Hundred Thousand Dollars (\$1,100,000.00).

VII.

And your orator further shows that on or about the 19th day of December, 1910, the Board of Directors of said District filed in the District Court of said Canyon County a petition praying in effect that all the proceedings of said Board from the organization of said District to and including the authorization and issuance of said bonds may be examined, approved and confirmed by the Court, and also that the proceedings of the Board of County Commissioners of Canyon County relating to the organization of said District may also be approved, examined and confirmed by the Court, and praying that

said District may be held and decreed legally organized and that the bonds authorized to be issued as aforesaid may be held and decreed to be the legal, valid and binding obligations of said District; that such proceedings were had on said petition and in the matter of the confirmation of the organization of said District and the authorization of said bonds, that thereafter and in the month of January, 1911, the said District Court of the Seventh Judicial District of the State of Idaho in and for Canyon County made its findings of fact and conclusions of law and entered its judgment and decree approving and confirming each and all of the proceedings had and taken for the organization of said District, and adjudging the same to be duly organized, and that said bonds had been legally and properly authorized by the votes of the electors of said District at the [4] election held as aforesaid on the 3d day of December, 1910, and thereafter an appeal was taken from said judgment and decree to the Supreme Court of the State of Idaho, which Court on the 14th day of February, 1911, in a cause entitled "Emmett Irrigation District, a corporation, Respondent, vs. W. H. Shane, Appellant," affirmed the judgment entered by the said District Court and by its said decision (19 Idaho Reports, page 332, et seq.), approved and confirmed all the proceedings had and taken for the organization of said District and the authorization of said bonds.

VIII.

Your orator further shows that thereafter the said Emmett Irrigation District, acting by and through

its Board of Directors, caused the bonds of said District, authorized as aforesaid, to be issued, sold and delivered to the amount of Nine Hundred Thousand Dollars (\$900,000.00) or upwards, as your orator is informed and believes and so alleges the fact to be

IX.

Your orator further shows that the said bonds were coupon bonds negotiable in form and payable to bearer and were issued as provided in Section 2397 of the Revised Codes of Idaho, and were of the denominations of One Hundred Dollars (\$100.00), Five Hundred Dollars (\$500.00), and One Thousand Dollars (\$1,000.00), respectively, and, except as to number, amount and date of maturity, were identical in form and of like tenor and effect, and were in words and figures substantially as follows, to wit: [5]

“UNITED STATES OF AMERICA.

STATE OF IDAHO.

COUNTY OF CANYON.

\$——

EMMETT IRRIGATION DISTRICT.

Number ——

First Issue.

Six Per Cent Municipal Irrigation District Bond.

Series No. 1 —— Year Bond.

KNOW ALL MEN BY THESE PRESENTS:

That the Emmett Irrigation District, a municipal corporation located in the County of Canyon, State of Idaho, for value received, acknowledges itself to owe and hereby promises to pay to the bearer hereof the sum of —— DOLLARS (\$——) on the First day of January, A. D. 19——, together with interest thereon from the date hereof until paid at the rate

of six per cent (6%) per annum, interest payable semi-annually on the first days of January and July in each year upon presentation of the annexed interest coupons as they severally become due. Both principal and interest are payable in lawful money of the United States of America at the office of the Treasurer of Emmett Irrigation District in the County of Canyon in the State of Idaho, or, at the option of the holder hereof, at the Fort Dearborn Trust and Savings Bank in the City of Chicago, Illinois. This bond is one of a series of bonds aggregating One Million One Hundred Thousand Dollars (\$1,100,000.00) in amount and issued by the undersigned by authority of an act of the Legislature of the State of Idaho entitled "An Act relating to irrigation districts and to provide for the organization thereof and to provide for the acquisition of water and other property and for the distribution of water thereby for irrigation purposes, and for other and similar purposes," approved March 9th, 1903, together with acts amendatory thereto and supplemental thereto, the same being known as "Title 14 of the Political Code of the State of Idaho," entitled "Irrigation Districts." Said Series consisting of two hundred and sixty-two (262) bonds of the par value of One Thousand Dollars (\$1,000) each, numbered consecutively from M-1 to M-262, inclusive; sixteen hundred and forty-six (1646) bonds of the par value of Five Hundred Dollars (\$500) each, numbered consecutively from D-1 to D-1646, inclusive, and one hundred and fifty (150) bonds of the par value of One Hundred Dollars (\$100) each, num-

bered consecutively from C-1 to C-150, inclusive which are due and payable as follows: Fifty-five Thousand Dollars (\$55,000) in amount, being bonds numbered from D-1 to D-110, inclusive, on January 1st, 1922; Sixty-six Thousand Dollars (\$66,000) in amount, being bonds numbered from M-1 to M-7 inclusive, and from D-111 to D-228, inclusive, on January 1st, 1923; Seventy-seven Thousand Dollars (\$77,000) in amount, being bonds numbered from M-8 to M-17, inclusive, and from D-229 to D-362 inclusive, on January 1st, 1924; Eighty-eight Thousand Dollars (\$88,000) in amount, being bonds numbered from M-18 to M-32, inclusive, and [6] from D-363 to D-508, inclusive, on January 1st, 1925; Ninety-nine Thousand Dollars (\$99,000) in amount, being bonds numbered from M-33 to M-42, inclusive, and from D-509 to D-656, inclusive, and from C-1 to C-150, inclusive, on January 1st, 1926; One Hundred and Ten Thousand Dollars (\$110,000) in amount, being bonds numbered from M-43 to M-57 inclusive, and from D-657 to D-826, inclusive, on January 1st, 1927; One Hundred and Twenty-One Thousand Dollars (\$121,000) in amount, being bonds numbered from M-58 to M-92, inclusive, and from D-827 to D-998, inclusive, on January 1st, 1928; One Hundred Forty-three Thousand Dollars (\$143,000) in amount, being bonds numbered from M-93 to M-137, inclusive, and from D-999 to D-1194, inclusive, on January 1st, 1929; One Hundred Sixty-five Thousand Dollars (\$165,000) in amount, being bonds numbered from M-138 to M-192, inclusive, and from D-1195 to D-1414, inclusive, on January 1st

1930, and One Hundred Seventy-six Thousand Dollars (\$176,000) in amount, being bonds numbered from M-193 to M-262, inclusive, and from D-1415 to D-1646, inclusive, on January 1st, 1931. And it is hereby certified that all things required by law to be done in and about the organization of said District and the issuance of the said bonds have been done, have happened and have been performed, and that the issuance of this bond has been duly and legally authorized by vote of the electors of said District at a special election duly called and held in accordance with the provisions of the said Act and by resolution of its Board of Directors, and that all other acts, conditions and things required by the laws and constitution of the State of Idaho precedent to and in the issue and delivery of this bond have been done, have happened and have been performed, and that said bonds are the valid, binding and legal obligation of the said District; that all the real property included within said District is subject to the levy of an annual tax for the payment thereof.

IN WITNESS WHEREOF, the said Emmett Irrigation District has by virtue of the authority aforesaid caused this bond to be executed in its name by its President and Secretary and the seal of its Board of Directors to be affixed hereto this First day of January, A. D. 1911.

EMMETT IRRIGATION DISTRICT.

(Signed) By W. E. BELL,
President.

(Seal) Attest: HARRY S. WORTHMAN,
Secretary."

That to each of said bonds semi-annual interest coupons were attached, all of which were of like tenor and effect and identical in form, except as to date of maturity, amount, and the number of the bond to which they were attached; said coupons, [7] with the exceptions stated, being substantially in words and figures following, to wit:

“On the first day of ———, A. D. 19——, EMMETT IRRIGATION DISTRICT will pay to bearer at the office of the County Treasurer of Canyon County, Idaho, or at the option of the holder hereof at Fort Dearborn Trust and Savings Bank in the City of Chicago, Illinois, the sum of ——— Dollars in lawful money of the United States, being six months’ interest due that day on its Municipal Irrigation District Bond of January 1st, A. D. 1911.

Series No. 1, Issue No. 1.

No. ——. \$——.

HARRY S. WORTHMAN,
Secretary.”

X.

Your orator further shows that all of said bonds were signed by the President and Secretary of said Emmett Irrigation District, and the seal of the Board of Directors of said District affixed thereto, and that the interest coupons attached to said bonds were each and all signed by the Secretary of said District. And said bonds were thereupon issued and sold by said District in the manner in such cases made and provided by the laws of the State of Idaho, as your orator is informed and believes and so alleges the fact to be, and the proceeds thereof received and used by

said District in the purchase of irrigation works, water rights and property required or deemed necessary by the Board of Directors of said District for carrying out the plans formulated by said Board, as hereinbefore stated, for the purpose of furnishing water for irrigating the lands situated within the boundaries of said District.

XI.

Your orator further alleges and shows that relying upon the decision of the Supreme Court of the State of Idaho in the cause heretofore referred to, wherein the said Emmett [8] Irrigation District was respondent and the said W. H. Shane, appellant, reported in Volume 19, Idaho Reports, page 332, and the decision of the District Court of the Seventh Judicial District of the State of Idaho in and for Canyon County in said cause, holding, adjudging and decreeing said District legally organized and existing, and that said bonds had been legally authorized and were the valid and binding obligations of said District, and relying also upon the recitals contained in said bonds that the same had been issued in compliance with the laws of the State of Idaho and that all things required to make the same the legal, valid and binding obligations of said District had been done and had happened and been performed, and that all real property included within said District was subject to the levy of an annual tax for the payment thereof, and without notice or knowledge of any fact whatsoever impairing the validity of said bonds or any of them, your orator purchased prior to January 1st, 1914, for a valuable consideration the bonds of

said District issued as aforesaid, to the amount of One Hundred and One Thousand Dollars (\$101,000.00) and now is and ever since has been the owner and holder of said bonds, which said bonds are of the number and denomination following, to wit:

M-14, M-15, M-16, M-18, M-19, M-132, M-133, M-134, M-135, M-136, M-143, M-144, M-145, M-203, and M-232, total fifteen (15) bonds, each of the denomination of One Thousand Dollars (\$1,000.00), and D-63, D-64, D-65, D-66, D-111, D-112, D-120, D-121, D-139, D-140, D-141, D-142, D-150, D-151, D-152, D-153, D-154, D-174, D-175, D-176, D-177, D-178, D-179, D-180, D-246, D-261, D-268, D-279, D-280, D-283, D-284, D-285, D-286, D-287, D-288, D-307, D-310, D-311, D-312, D-318, D-319, D-361, D-408, D-409, D-410, D-411, D-412, D-416, D-417, D-418, D-481, D-482, D-483, D-484, D-485, D-486, D-487, D-488, D-489, D-490, D-500, D-501, D-502, D-503, D-504, D-519 to D-538, inclusive, D-569 to D-578, inclusive, D-594, D-599, D-644, D-645, [9] D-651, D-652, D-653, D-654, D-655, D-656, D-673, D-674, D-675, D-676, D-717 to D-726, inclusive, D-742, D-743, D-780, D-783, D-784, D-785, D-786, D-787, D-788, D-801 to D-814, inclusive, D-833, D-1065, D-1066, D-1070, D-1071, D-1072, D-1278, D-1279, D-1280, D-1281, D-1305, D-1306, D-1307, D-1308, D-1309, D-1321, D-1332, D-1432, D-1598, D-1599, and D-1600 to D-1609, inclusive, total one hundred seventy-two (172) bonds, each of the denomination of Five Hundred Dollars (\$500.00).

XII.

Your orator further alleges and shows that after the said District had sold, issued and delivered its said bonds, it determined the benefits which would accrue to each of the tracts or subdivisions of land from the purchase and construction of the irrigation works and paid for by the proceeds from the sale of said bonds, and said Board caused the cost of such works to be apportioned over each tract and subdivision of land in said District in proportion to the benefits received, all as provided in Section 2399 of the Revised Codes of Idaho as amended by Chapter 154 of the Session Laws of 1911 of the legislature of the State of Idaho, and said Board caused to be prepared a list of such apportionment or distribution containing a complete description of each subdivision or tract within said District, with the amount and rate per acre of the apportionment of such costs and the name of the owner thereof, together with all necessary maps, and the action of such Board in apportioning such benefits and the cost of such works to the several tracts of land in said District was thereafter and upon the petition of such Board, filed as required by law, duly approved and confirmed by the District Court of the Seventh Judicial District of the State of Idaho in and for Canyon County and the decree and judgment of said Court in said matter was entered on or about the — day of June, 1913, and no appeal was taken therefrom, and such decree has become final. [10]

XIII.

Your orator further alleges and shows that all in-

terest accruing on said bonds and evidenced by interest coupons thereto attached, as aforesaid, maturing January 1st and July 1st of each year, has been paid, except the interest coupons maturing January 1st, 1914, none of which have been paid, and the amount of such interest coupons attached to the bonds held by your orator and representing the interest due thereon on the 1st day of January, 1914, and remaining unpaid as aforesaid, aggregates the sum of Three Thousand Thirty Dollars (\$3,030.00).

XIV.

Your orator further shows that on or about the 22d day of October, 1913, at a regular adjourned meeting of the regular session of the Board of Directors of said District for the said month of October, the said Board of Directors levied an assessment against all the lands in said District, aggregating Fifty-five Thousand Dollars (\$55,000.00) for the payment of the interest maturing January 1st, 1914, and July 1st, 1914, upon the outstanding bonds of said District, including the bonds owned and held by your orator as aforesaid, which said levy and assessment was based upon the assessment of benefits as fixed by the said Board and confirmed by the said District Court in and for said Canyon County, as aforesaid, and the Secretary of said District thereupon prepared the assessment book and on or before November 1st, 1913, delivered the same to the Treasurer of the District. That the Treasurer of said District after receiving such assessment book from the Secretary, and within ten days thereafter, published notice for the time and in the manner required by

Chapter 139 of the Session Laws of 1911 of the State of Idaho, amending Section 2412 of the Idaho Revised [11] Codes, that said assessments were due and payable and would become delinquent at six o'clock P. M., on the third Monday of December next thereafter, and stated also therein the times and places at which payments of the assessment might be made, which notice was published for at least three times in a weekly paper published in the County in which said District is situated.

XV.

Your orator further shows that a large number of land owners and taxpayers in said Emmett Irrigation District have paid the taxes so levied and assessed against their said lands for the payment of interest on the bonds held by your orator and on other outstanding bonds of said Emmett Irrigation District, but the said District and the Treasurer and Board of Directors thereof have failed and neglected to use any of said money so collected to pay the interest on said bonds maturing January 1st, 1914, but have allowed default to be made in the payment of such interest and have failed and neglected to deposit with the said Fort Dearborn Trust and Savings Bank of Chicago, Illinois, any money to meet the interest maturing January 1st, 1914, on the bonds of said District, and on or about the 9th day of January, 1914, your orator caused to be presented to the Treasurer of said District for payment the interest coupons maturing January 1st, 1914, on his said bonds which said interest coupons aggregate, as heretofore stated, Three Thousand and Thirty Dollars (\$3,030.00), and

demanded payment thereof, but the said Treasurer, notwithstanding he had in his possession and in his custody and control the interest fund belonging to said District and collected as aforesaid from the taxpayers in said District for the purpose of [12] paying such interest, and which interest fund exceeded the amount of the coupons so presented for payment, declined to pay said coupons or any of them, and declined to use the money in such interest fund for the payment of said coupons, and the said District is now in default in the payment of said coupons, notwithstanding there is, as heretofore stated, in the possession of the Treasurer of said District and under his control sufficient money in the interest fund created for such purpose, with which to pay such coupons.

XVI.

Your orator further shows that for some reason unknown to your orator the said defendants declined to apply the moneys collected from the taxpayers of said District with which to pay said interest, to the payment of the interest due on said bonds or the coupons held by your orator, and unless enjoined and restrained by this Honorable Court the said defendants will either return such money to the persons from whom the same was collected or who paid the same to said Treasurer for the use of said interest fund, or will divert such money from the interest fund and use it for other purposes and will not apply it to the payment of interest or to any purpose for the benefit of the holders of said bonds.

XVII.

Your orator further alleges and shows upon his information and belief that default in payment will be made by the said defendants from time to time as each installment of interest on said bonds becomes due and payable. And your orator further shows that the principal of none of said bonds will become due or payable for many years to come; that said bonds mature serially, commencing the first day of January, 1922, and [13] extending over a period of ten years, as provided in Section 2397 of the Revised Codes of Idaho; that should your orator and other holders of said bonds be required to bring suits against said District as each installment of interest on said bonds becomes due, or as the principal of said bonds mature, numerous suits would be required; and if suit or action against the District be delayed until all of said bonds have become due and payable great and irreparable injury will be sustained by your orator and all holders of said bonds because of loss of interest and the uncertainties and unsettled conditions for many years and which will wholly destroy the market value of said bonds in the meantime; that it would be impossible for said District and the taxpayers therein to pay the whole of said bond issue and the accumulated interest thereon by one levy or assessment; that the same can only be paid in installments extending over a long period as provided in said bonds and as contemplated by the laws of the State of Idaho relating to such matters.

Your orator further shows that in order to avoid great loss and injury to your orator and other hold-

ers of said bonds, it is necessary to have said bonds decreed without delay, to be the legal and valid obligations of said District, and to have appropriate process for enforcing the payment of the interest and principal thereof, as the same become due from time to time. And your orator brings this suit for himself and all other holders of bonds of said District, who may desire to join in this proceeding and pay their proper proportion of the costs herein.

XVIII.

Your orator further alleges and shows upon his information and belief, that the said defendants, officials of said District, are counselling and advising taxpayers in said District not to pay their taxes levied for the purpose of paying [14] the interest on said bonds, and are making no effort to collect the payment of such taxes, but by their actions, conduct, and statements, are encouraging default in the payment of such taxes and are encouraging agitation and litigation against the bondholders, and fomenting a spirit of repudiation among the taxpayers, with a view of ultimately repudiating the payment of the bonds issued as aforesaid, and the interest thereon, including the coupons held by your orator, as aforesaid; and inviting suits by taxpayers of said District, attacking the validity of such bonds and the right of the District to pay such bonds or the interest thereon; that said defendants by their conduct and actions are greatly depreciating the market value of said bonds, and causing irreparable injury to your orator in the premises, and to other holders of the bonds of said District; that said defendants should in justice

and good conscience, as well as by the law, be held estopped from claiming any irregularities in the issuance, delivery or sale of said bonds that could or might invalidate the same in the hands of your orator, who is an innocent holder for value without notice or knowledge of any irregularity in the authorization, issuance or sale thereof, or in any matter whatsoever affecting the same; and your orator verily believes that unless the said defendants and each of them, are restrained and enjoined by this Honorable Court, they will not only divert or appropriate for other uses, or return to the taxpayers the moneys collected as aforesaid for the payment of interest on said bonds, but will allow default to be made in the steps and proceedings required to be taken by them in order to make legal or valid the sale of property in said District for delinquent taxes, and will permit the taxpayers who have paid no taxes to wholly escape the penalties of such default [15] and escape the payment of such taxes, and will institute or encourage proceedings to be instituted and actions to be commenced against the District attacking the validity of said bonds, all of which will render the bonds held by your orator, and the other bonds of said District issued as aforesaid, unsalable, and will greatly depreciate, if not entirely destroy, the market value thereof, and will result in numerous suits and long and protracted litigation and otherwise cause great and irreparable injury to your orator and other holders of the bonds of said District.

IN CONSIDERATION WHEREOF, and forasmuch as your orator is without adequate remedy, save

in a court of equity, your orator prays this Honorable Court to issue its writ of subpoena in due form of law, directed to the said Emmett Irrigation District and W. H. Shane, N. B. Barnes and E. J. Reynolds as Directors, and R. B. Shaw as Treasurer of said Emmett Irrigation District, defendants aforesaid, commanding them, and each of them, at a certain day and under a certain penalty to be therein specified, to appear before this Honorable Court to answer all and singular the matters and things hereinbefore set forth and complained of. But the answer to the bill of complaint need not be under oath, an answer under oath being hereby expressly waived.

And your orator prays that the said defendants, and each of them, may be restrained by injunction, preliminary until further hearing and perpetual thereafter, from diverting or otherwise appropriating or using for any purpose other than for the payment of interest on the bonds of said District the [16] moneys collected for or hereafter paid into the interest fund created for the payment of interest on the bonds of said District issued as aforesaid, and that said defendants be required to apply the money in said interest fund to the payment of the interest due on the bonds of said District, and that they, and each of them, be restrained and enjoined from fomenting, instigating, or encouraging by their acts, statements, conduct or otherwise, suits or actions to be instituted or commenced against the District or the holders of its bonds attacking the validity of the bonds or coupons issued as herein alleged, or enjoining the payment thereof or the payment of the in-

terest thereon, and from counselling, advising or in any manner encouraging default on the part of taxpayers in the payment of the taxes levied as herein alleged for the payment of interest on such bonds, and from doing any act or thing whatsoever which can or may depreciate the market value of said bonds and the interest coupons thereto attached, and that they be enjoined and restrained from allowing or permitting default to be made in the proceedings or any of the proceedings required to be taken or the acts to be performed under the laws of the State of Idaho in order to accomplish a valid sale of property in said District for delinquent taxes under the levy made by said Board for the payment of interest on the bonds of said District, and that they, and each of them, be enjoined from instituting any proceedings or making any defense to any suit or action instituted by others attacking the validity of the bonds held by your orator or of the coupons thereto attached; and that upon final hearing it may be adjudged and decreed that all the bonds of said District of the said issue and [17] series are legal and valid obligations of said District, and that payment thereof and of the interest coupons thereto attached must be made at the time and in the manner therein provided; and that your orator may have such other and further relief as the nature and circumstances

of the case may require, and as to this Court shall seem just and equitable.

J. H. RICHARDS,
OLIVER O. HAGA,
McKEEN F. MORROW,
Solicitors for Complainant.

Office and Postoffice Address: Idaho Building, Boise,
Idaho. [18]

United States of America,
District of Idaho,—ss.

Oliver O. Haga, being duly sworn, deposes and says: That he is one of the solicitors for J. Paul Thompson, plaintiff above named; that he has read the foregoing bill of complaint and knows the contents thereof, and that he believes the same to be true; that he makes this affidavit and verification for and on behalf of said plaintiff for the reason that said plaintiff is absent from the said District, and this affiant further says that he has obtained his information relative to the matters set forth in said bill of complaint from official records and letters and other communications received concerning such matters from sources which he believes to be reliable.

OLIVER O. HAGA.

Subscribed and sworn to before me, this 10th day of March, 1914.

[Seal]

EDNA L. HICE,
Notary Public.

[Endorsed]: Filed March 10, 1914. A. L. Richardson, Clerk. By E. B. Yarrington, Deputy. [19]

*In the District Court of the United States for the
District of Idaho, Southern Division.*

J. PAUL THOMPSON,

Plaintiff,

vs.

EMMETT IRRIGATION DISTRICT, a Municipal
Corporation, W. H. SHANE, N. B. BARNES,
and E. J. REYNOLDS, as Directors, and
R. B. SHAW, as Treasurer of said EMMETT
IRRIGATION DISTRICT,

Defendants.

Amendment to Bill.

Now, comes the plaintiff under leave of Court first
had and obtained, and amends his Bill of Complaint
herein as follows:

First: By striking out in Paragraph XVI of said
bill in the first and second lines thereof the words,
“for some reason unknown to your orator the said
defendants,” and inserting in lieu thereof the fol-
lowing: “the defendants wrongfully and without
cause.”

Second: By inserting a new paragraph to be num-
bered Paragraph XIX at the end of Paragraph
XVIII and between said Paragraph XVIII and the
prayer of said bill, to read as follows:

XIX.

Your orator further shows that the said defend-
ants sometimes contend that a portion of the bonds,
to wit: about one-fifth thereof, issued by said
Emmett Irrigation District were issued or sold by

said District without any consideration, or any adequate consideration being paid therefor, but said defendants [20] do not state or pretend to know which of said bonds were so issued and do not identify them by number or otherwise so that any of the present holders of said bonds or any other person can learn or ascertain what bonds the said defendants refer to or contend were sold illegally or without adequate or any consideration having been paid therefor, and by reason of such general, vague and indefinite charges against the outstanding bonds of said District a cloud is thrown upon the validity or legality of all the bonds of said District so outstanding, including the bonds held by your orator, and the market value of all of such bonds is thereby greatly depreciated, if not entirely destroyed, but your orator is informed and believes and alleges the fact to be that such contentions or charges are wholly unfounded and untrue and are made only for the purpose of furnishing some excuse or pretense for not paying interest on any of the bonds issued by said District and for defaulting in the payment of such tax and for doing the other acts and things hereinbefore set forth and charged against the said defendants; that such false and unfounded charges, made as aforesaid by the officers of said District against the bonds so issued and outstanding, have been widely circulated and are frequently made and repeated, and as a result thereof defaults are being made by the taxpayers in the payment of the taxes levied for the payment of interest on said bonds, and the contentions, agitation and controversies over the

validity of said bonds and over the payment of such taxes are becoming general throughout said district and reports thereof are being circulated by taxpayers in and officers of said District among financial institutions and investors dealing in such bonds, and your orator verily believes [21] that numerous suits will be instituted by taxpayers in said District attacking the validity of such bonds and the validity of the assessments made for the payment of interest thereon, and statements have repeatedly been made by officers of said District and by some of the defendants herein that the District will not pay said bonds unless compelled to do so by a decree or judgment of Court; that one suit has already been instituted in the District Court of the Seventh Judicial District of the State of Idaho in and for Canyon County by one Clayton B. Knox against the said R. B. Shaw, as Treasurer of the said Emmett Irrigation District, for an order restraining said defendant, as Treasurer of said District, from collecting or attempting to collect any tax from said plaintiff for the payment of interest on said bonds, or any of them, or from advertising plaintiff's land for sale and from issuing any certificate of sale or tax deed thereto, because of the failure of plaintiff to pay such tax; that such suit is still pending before said Court undetermined and without any order or decree having been entered therein. And your orator believes that other suits by other taxpayers or other persons interested in said District or officers of said District will be instituted at any time involving the validity of such tax and the validity of said bonds,

and final judgments or decrees may be entered therein against said District or the officers thereof affecting the validity of said bonds and the collection of taxes for the payment of the interest or principal of said bonds, all without notice to or knowledge thereof by the holders of said bonds, who are widely scattered and who reside mostly, if not entirely, in other States than the State of Idaho and at such distances from the place where such suits will be brought that they could [22] not, except by the merest chance, learn such suits had been brought or were pending; and your orator further shows that because of the attitude of the said defendants towards the said bonds no adequate or proper defense to such suits will be made by said defendants.

J. PAUL THOMPSON,

By RICHARDS & HAGA,

McKEEN F. MORROW,

Solicitors for Complainant, Postoffice Address:
Idaho Building, Boise, Idaho.

United States of America,

District of Idaho,—ss.

Oliver O. Haga, being first duly sworn, deposes and says: That he is one of the solicitors for J. Paul Thompson, plaintiff above named; that he has read the foregoing amendment to plaintiff's Bill of Complaint and knows the contents thereof and believes the same to be true; that he makes this affidavit and verification for and on behalf of said complainant for the reason that said plaintiff is absent from said District; and this affiant further says that he has obtained his information relative to the matters set

forth in said amendment from official records and letters and other communications received concerning such matters, and from sources which he believes to be reliable.

OLIVER O. HAGA. [23]

Subscribed and sworn to before me, this 5th day of June, 1914.

[Seal]

EDNA L. HICE,
Notary Public.

Service of the foregoing amendment and receipt of copy thereof, admitted this 5th day of June, 1914.

WOOD & DRISCOLL,
Solicitors for Defendants.

[Endorsed]: Filed June 6th, 1914. A. L. Richardson, Clerk. By E. B. Yarrington, Deputy. [24]

*In the District Court of the United States for the
District of Idaho, Southern Division.*

J. PAUL THOMPSON,

Plaintiff,

vs.

EMMETT IRRIGATION DISTRICT, a Municipal Corporation, W. H. SHANE, N. B. BARNES and E. J. REYNOLDS, as Directors, and R. B. SHAW, as Treasurer of Said EMMETT IRRIGATION DISTRICT,

Defendants.

Motion to Dismiss Bill of Complaint as Amended.

To the Honorable, the Judge of the District Court of the United States, for the District of Idaho, Southern Division.

Come now the defendants herein, by Messrs.

Thompson & Buckner and by Messrs. Wood & Driscoll, their solicitors, and move to dismiss the bill of complaint as amended filed herein by the said plaintiff, for the following reasons, to wit:

I.

That the plaintiff has not, in and by said bill of complaint as amended, stated such a cause as does or ought to entitle him to any such relief as equitably sought and prayed for, or any other relief from or against these defendants, or either of them, in that said bill of complaint [25] as amended shows upon its face that said plaintiff is not entitled to the relief prayed for, or to any relief.

II.

The defendants move to dismiss said bill for uncertainty, in this, to wit, that the said bill of complaint as amended fails to show whether the plaintiff is seeking to recover by virtue of an action at law therein, to be enforced by writ of mandate of this court, or whether he alone seeks the interposition of the equitable jurisdiction of this court for the purpose of restraining the alleged wrongful acts in said bill of complaint as amended attempted to be set forth.

III.

Defendants further move to dismiss said bill for the reason that said bill sets forth, or attempts to set forth, two separate causes of action, one an action at law for recovery of the money due upon the alleged defaulted coupons owned by plaintiff, the judgment of the Court thereon to be enforced by a writ of mandate; the other, an action in equity, to

restrain the defendants from doing or performing any of the acts complained of in said bill of complaint, as amended.

IV.

Defendants, and each of them, further move to dismiss said complaint, for the reason that the said plaintiff has a plain, speedy and adequate remedy at law, to wit, an action at law against the defendant, Emmett Irrigation District, for judgment upon the defaulted coupons owned by said plaintiff, including the right to enforce any judgment secured therein by writ of mandate issued by this court.

V.

Defendants further move to dismiss the bill of complaint herein as amended, for the reason that the defendants, W. H. Shane, N. B. Barnes and E. J. Reynolds, as Directors of said Irrigation District, have been improperly joined as defendants [26] with said Emmett Irrigation District and said R. B. Shaw as Treasurer of said District.

VI.

Defendants further move to dismiss the said complaint as amended, for the reason that it is alleged in said complaint as amended, that the bonds of said district, described in said complaint as amended, to the amount of nine hundred thousand dollars or upwards have been issued and are now outstanding in the hands of purchasers thereof, who reside mostly, if not entirely, in other States than the State of Idaho, and that plaintiff herein is the owner of but a portion of the said bonds, to wit, the amount of \$101,000.00, and that the Treasurer of the said

District is now in possession of the interest fund belonging to the said District and collected for paying the taxes on the coupons of said bonds and all of them, and the owners and holders of all the said bonds issued and outstanding as aforesaid, save and except said plaintiff, are not made parties to this action, and said suit is therefore defective for want of or nonjoinder of parties.

WHEREFORE, defendants pray that said bill of complaint as amended be dismissed and that they, or either of them, be not required to answer herein.

J. M. THOMPSON,

Residing at Caldwell, Idaho, and

FREMONT WOOD and

DEAN DRISCOLL,

Residing at Boise, Idaho, Solicitors for Defendants.

Service of the foregoing motion, by copy, at Boise, Idaho, acknowledged this 25th day of June, 1914, and consent is hereby given that the same may be filed on the 26th day of June, 1914, [27] to the same effect as if filed within the time limited by the former stipulation of the parties.

RICHARDS & HAGA and

McKEEN F. MORROW,

Residing at Boise, Idaho,

Solicitors for Plaintiff.

[Endorsed]: Filed June 26, 1914. A. L. Richardson, Clerk. [28]

*In the District Court of the United States for the
District of Idaho, Southern Division.*

J. PAUL THOMPSON,

Plaintiff,

vs.

EMMETT IRRIGATION DISTRICT, a Municipal
Corporation et al.,

Defendants.

**Decision on Motion to Dismiss Complaint as
Amended.**

Aug. 15, 1914.

J. H. RICHARDS, OLIVER O. HAGA, and
McKEEN F. MORROW, Solicitors for
Plaintiff.

J. M. THOMPSON, FREMONT WOOD, and
DEAN DRISCOLL, Solicitors for Defend-
ants.

DIETRICH, District Judge:

By their motion the defendants question the sufficiency of the facts stated by plaintiff to entitle him to equitable relief. It is shown by the bill and the amendments thereto that the defendant Emmett Irrigation District was duly organized under the laws of the State of Idaho, and that its board of directors, at a meeting regularly called for that purpose, determined that it would require \$1,100,000.00 to purchase and construct the necessary irrigation works to supply the needs of the land owners of the district. In the manner prescribed by law the question whether or not bonds to that amount should

be issued was submitted to the electors of the district; the vote was favorable. Thereupon, in a special proceeding provided by statute, in the District Court of Canyon County, Idaho, a decree was duly given and made adjudging that the District [29] had been regularly organized, and that the issuance of the bonds had been properly authorized. This decree was later affirmed by the Supreme Court of the State.

It is further shown that subsequently bonds in excess of \$900,000.00 of the issue so authorized were actually sold and delivered by the defendant to various purchasers, and that the plaintiff is an innocent holder for value of fifteen of such bonds, of the par value of \$1,000.00 each, and one hundred and seventy-two, of the par value of \$500.00 each, aggregating \$101,000.00. The form of bonds is fully pleaded, and it appears therefrom that they bear interest at the rate of six per cent per annum, payable semi-annually, on the 1st day of January and the 1st day of July of each year, the interest being covered by coupons of the usual form. It is further shown that after the issuance and sale of the bonds the defendant District caused the amount thereof to be apportioned over each tract and subdivision of land in the District in proportion to the benefits to be received from the construction of the irrigation works, all as provided in Section 2399 of the Revised Codes of Idaho, which said apportionment was afterwards duly approved and confirmed by the District Court of the Seventh Judicial District of Idaho in and for Canyon County.

All coupons prior to those maturing January 1, 1914, were paid, but no part of the interest due January 1, 1914, and there is due the plaintiff on account thereof the sum of \$3,030.00. It further appears that on or about October 22, 1913, at a regular adjourned meeting of the board of directors of the District, an assessment was levied for the purpose of meeting the interest maturing January 1, 1914, and July 1, 1914, upon the outstanding bonds, including those of the plaintiff, amounting to \$55,000.00, and that all the preliminary steps required by law were taken for the collection of this assessment, and that a large number of land [30] owners and taxpayers of the District paid the taxes so levied against their several lands. On January 1, 1914, the plaintiff caused to be presented to the treasurer of the District his interest coupons maturing upon that date, aggregating \$3,030.00, with demand for payment thereof, but notwithstanding the fact that he had in his possession more than that amount of money, the treasurer declined to pay the coupons or any of them. It is further alleged that the defendants wrongfully decline to apply the moneys so collected from taxpayers to the payment of said interest, and that unless they are restrained from so doing they will either return the money to the persons from whom the same was collected, or will divert it from the interest fund and apply it to other purposes. In this connection, however, it is not alleged that any of the money so collected has been returned or has been diverted, or that there has been any threat to so return or divert the same, nor are

any facts stated upon which to found a reasonable belief that such action is contemplated or will be taken.

It is further shown that the entire issue of bonds will mature serially, commencing on the 1st day of January, 1922, and extending over a period of ten years; and in that connection it is alleged, upon the plaintiff's information and belief, without, however, a showing of any facts or circumstances upon which such information and belief are based, that default will be made by defendants from time to time as each installment of interest becomes due, and that therefore numerous suits by the plaintiff and other bondholders will be required to enforce their rights. It is also alleged that it would be impracticable and unjust to the holders of the bonds to require them to wait until the principal of the bonds matures before bringing suit to collect the interest.

It is further averred upon information and belief that the individual defendants, officers of the Irrigation District, are counseling and advising the taxpayers to decline to pay their taxes, [31] and are making no effort to collect the same, and are encouraging litigation against the bondholders, with a view of ultimately repudiating the payment of both the principal and interest of the bonds, and that by such action the market value of the bonds is being depreciated. The plaintiff further asserts his belief that the defendants will, by their failure to take the necessary steps to enforce the payment of taxes, permit those who have not already paid to escape payment. It is further shown that the defendants sometimes

contend that about one-fifth of the outstanding bonds were issued without any, or, at least, without adequate consideration, but do not specify or identify the particular bonds so charged to have been improperly issued, and that by some of the defendants statements have been repeatedly made that the District will not pay the bonds unless compelled so to do by decree of Court, and that it is not unlikely that numerous suits will be instituted by taxpayers attacking the validity of the bonds, and that one such suit has already been instituted in one of the State courts by a taxpayer, against the treasurer of the District, to restrain him from collecting any tax against such taxpayer for the payment of interest on the bonds. Such inconsiderable detail is the showing made by the bill, together with the amendments thereto. There is a prayer that the defendants be enjoined from diverting the funds collected and from denying the validity of the bonds, or encouraging or instigating others to do so, and also that they be required to pay the bonds and coupons, in accordance with the terms thereof, and to take such steps as are authorized by law to procure the necessary funds therefor.

The contention of the defendants is that the plaintiff has an adequate remedy at law, and that therefore the Court, upon the equity side, is without jurisdiction. It is thought the contention must be sustained. If we could properly act upon the [32] general assertion of mere conclusions and inferences and of the suppositions and beliefs of the plaintiff, a different view might be taken; but when analyzed the facts

pleaded are deemed to be insufficient upon which to base equitable jurisdiction. The usual course in such cases is for the holder of the bonds to bring an action at law to recover the amount due upon his interest coupons, and if thereupon the debtor declines or fails to take the necessary steps to procure the fund, or, if such fund exists, to apply it to the payment of the interest, relief can be granted in a *mandamus* proceeding. It is not apparent why this course would not furnish a complete and adequate remedy in the present case. The bonds are a lien upon all the property in the District. It is not alleged that the property is being wasted or that it is deteriorating or is likely to deteriorate in value. It is averred that a small fund has accumulated in the treasury which is properly applicable to the payment of the interest, and the belief is expressed that it will be diverted, but, as already suggested, there is no allegation of any threat so to do, or of any actual past diversion, and no real basis for such a belief is disclosed. The probability of a multiplicity of suits is also asserted, but such danger does not appear to be imminent. There is no reason for concluding that if in an action at law upon the coupons the Court holds that the plaintiff is the rightful owner of bonds, the District will in the future decline to meet interest payments as and when they fall due. Much is said about the influence upon the market value of the bonds of the agitation against their payment, and of the statements circulated to the effect that they were improperly issued, but it is not at all improbable that a judgment in an action at law, favorable to the

plaintiff, would be quite as effective in quieting such agitation and in establishing the market value of the bonds as a decree of a court of equity. At least no reasons are put forward for anticipating [33] that the defendants will be inclined to be contumacious or disposed to harass the plaintiff in the enjoyment of any rights which may be established in an appropriate action. In the absence of a showing to the contrary, we must assume that the defendants are acting in good faith and are not averse to having the controversy tried out once for all in a court of law, where they may assert their constitutional right of having issues of fact determined by a jury. In *Vickrey vs. Sioux City*, (104 Fed. 164), *Farson vs. Sioux City*, (106 Fed. 278), *Burlington Savings Bank vs. Clinton*, (106 Fed. 269),—from the district of Iowa,—and *Olmstead vs. City of Superior*, (155 Fed. 172), from the district of Wisconsin,—a rule seems to be recognized which in a measure tends to support the jurisdiction contended for by the plaintiff. But in those cases the laws governing the relations of the parties were not the same, and in the *Olmstead* and *Vickrey* cases at least the facts were quite dissimilar. If we assume that the defendants are trustees for the bondholders, it is to be borne in mind that there has been no diversion or threatened diversion or misapplication of any trust funds, and there is no accounting to be had, and apparently the defendants do not repudiate their liability to rightful bondholders, but deny only that the plaintiff is such a holder of the bonds of which he has possession. If the defendants were misappro-

priating or threatening to misappropriate funds which are properly applicable to the payment of the plaintiff's coupons, it is not improbable that a court of equity would, upon a proper showing, afford all necessary protection, but it will not, upon the pretext of giving such relief, in advance of any real need therefor, draw to itself the whole of a controversy, the principal, if not the only substantive, issue in which may without difficulty or delay be tried out in an action at law; that would be to treat too lightly the fundamental right of a jury trial. I only assume, and do not decide, that the defendants are trustees for the bondholders. The bonds are the unconditional [34] obligations of the Irrigation District, and to that extent at least the relation between it and the plaintiff is that of debtor and creditor. However, an extended discussion of this question is not required at the present juncture. It will be time enough to consider to what extent trust features are involved when it is shown that the dissipation of the funds which have been collected, or their diversion, is a real peril.

The view we have taken is thought to be directly supported by the opinion of Judge Sawyer in *Hau-meister vs. Porter, Treasurer* (Cal.), 21 Fed. 355, and in a measure by the principles enunciated by Judge Ross in *Marra vs. San Jacinto P. V. Irrigation District* (Cal.), 131 Fed. 780. See, also, *Shepherd vs. Tulare Irr. District*, 94 Fed. 1; s. c., 185 U. S. 1; *Thompson vs. Perris Irr. District*, 116 Fed. 769; s. c., 122 Fed. 860.

It follows that the motion must be sustained, and

unless within four days from the date hereof the plaintiff by written notice filed with the clerk signifies his desire that the cause be transferred to the law side of the court, as authorized by General Equity Rule 22, a decree will be entered dismissing the bill.

[Endorsed]: Filed Aug. 15, 1914. A. L. Richardson, Clerk. [35]

*In the District Court of the United States for the
District of Idaho, Southern Division.*

IN EQUITY—No. —.

J. PAUL THOMPSON,

Plaintiff,

vs.

EMMETT IRRIGATION DISTRICT, a Municipal
Corporation et al.,

Defendants.

Decree Dismissing Bill.

The Court having rendered its decision herein on the 15th day of August, 1914, sustaining defendants' motion for dismissal of plaintiff's amended complaint, unless within four days from said date the plaintiff by written notice, filed with the Clerk of this Court, signified his desire that the cause be transferred to the law side of the court, as authorized by General Equity Rule No. 22; and it now appearing to the Court that plaintiff has not filed such written notice, or otherwise signified his desire that the cause be transferred to the law side of the court.

IT IS THEREFORE ORDERED AND DECREED that defendants' motion to dismiss plaintiff's bill as amended be sustained, and plaintiff's bill as amended hereby is dismissed out of this Court, with costs to defendants.

FRANK S. DIETRICH,
Judge.

Dated, September 2, 1914.

[Endorsed]: Filed Sept. 2, 1914. A. L. Richardson, Clerk. [36]

*In the District Court of the United States for the
District of Idaho, Southern Division.*

IN EQUITY—No. —.

J. PAUL THOMPSON,

Plaintiff,

vs.

EMMETT IRRIGATION DISTRICT, a Municipal Corporation, W. H. SHANE, N. B. BARNES, and E. J. REYNOLDS, as Directors, and R. B. SHAW, as Treasurer of said EMMETT IRRIGATION DISTRICT,

Defendants.

Assignment of Errors.

AND NOW COMES the plaintiff, J. Paul Thompson, and having presented an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree entered in the above cause on the 2d day of September, A. D. 1914, says that said decree, made and entered as aforesaid, is erroneous

and unjust to this plaintiff, and particularly in this:

1. Because the said Court erred in holding and deciding that plaintiff had an adequate remedy at law.

2. Because the said Court erred in holding and deciding that the facts alleged in plaintiff's bill, as amended, are insufficient upon which to base equitable jurisdiction.

3. Because said Court erred in holding and deciding that it was not apparent from said bill as amended that an action at law would not furnish a complete and adequate remedy in said cause.

4. Because said Court erred in holding and deciding that the allegations in plaintiff's bill as amended were not sufficient to justify a conclusion that the interest collected [37] and now in the possession of the Treasurer of said District would not be diverted, and in holding and deciding that it was necessary to show either an actual diversion of such interest fund or further facts justifying the conclusion that there would be a diversion before plaintiff would be entitled to equitable relief.

5. Because said Court erred in holding and deciding that there was no such probability of a multiplicity of suits as to justify a court of equity to take jurisdiction of said cause.

6. Because said Court erred in holding and deciding that there was no reason for concluding that, if in an action at law upon the coupons the Court should hold in favor of plaintiff, that the defendants would in the future decline to meet other interest payments as and when they fall due.

7. Because said Court erred in holding and deciding that it was not improbable that a judgment in an action at law favorable to the plaintiff would be as effective in quieting the agitation pleaded in the bill as amended and in establishing the market value of the bonds, as a decree of a court of equity, and in declining to take jurisdiction by reason thereof.

8. Because said Court erred in holding and deciding that the defendants do not repudiate their liability to rightful bondholders, but deny only that the plaintiff is such holder of the bonds of which he has possession.

9. Because the said Court erred in ordering and decreeing that plaintiff's bill as amended did not set forth sufficient facts to entitle plaintiff to relief in equity.

10. Because the said Court erred in ordering and decreeing that plaintiff's bill as amended be dismissed. [38]

WHEREFORE, plaintiff prays that said decree be reversed and set aside, and the District Court directed to overrule defendants' motion to dismiss, and to proceed with the hearing of said cause according to law and the rules of procedure governing the disposition of equitable causes.

RICHARDS & HAGA,
McKEEN F. MORROW,
Solicitors for Plaintiff.

Residence: Boise, Idaho.

Service of the foregoing Assignment of Errors,

and receipt of copy thereof admitted this 3d day of September, 1914.

WOOD & DRISCOLL,
J. M. THOMPSON,
Solicitors for Defendants.

[Endorsed]: Filed Sept. 3, 1914. A. L. Richardson, Clerk. [39]

*In the District Court of the United States for the
District of Idaho, Southern Division.*

IN EQUITY—No. —.

J. PAUL THOMPSON,

Plaintiff,

vs.

EMMETT IRRIGATION DISTRICT, a Municipal
Corporation, W. H. SHANE, N. B. BARNES,
and E. J. REYNOLDS, as Directors, and R.
B. SHAW, as Treasurer of said EMMETT
IRRIGATION DISTRICT,

Defendants.

Petition for Appeal.

AND NOW COMES J. Paul Thompson, the above-named plaintiff, and, conceiving himself aggrieved by the decree made and entered on the 2d day of September, A. D. 1914, in the above-entitled cause, doth hereby appeal from said order and decree dismissing his bill of complaint as amended, to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors which is filed herewith; and said plaintiff prays that this his appeal may be allowed, and that Citation

issue as provided by law, and that a transcript of the record, proceedings and papers upon which said order and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

RICHARDS & HAGA,
McKEEN F. MORROW,
Solicitors for Plaintiff.

Residence: Boise, Idaho. [40]

Order Allowing Appeal.

And now, to wit, on this 3d day of September, 1914, it is ORDERED that the foregoing petition be granted, and that the appeal be allowed as prayed for, and that plaintiff file a bond on appeal in the sum of Five Hundred Dollars (\$500.00) with good and sufficient security, to be approved by the Court.

FRANK S. DIETRICH,
District Judge.

[Endorsed]: Filed Sept. 3, 1914. A. L. Richardson, Clerk. [41]

*In the District Court of the United States for the
District of Idaho, Southern Division.*

IN EQUITY—No. —.

J. PAUL THOMPSON,

Plaintiff,

vs.

EMMETT IRRIGATION DISTRICT, a Municipal
Corporation, W. H. SHANE, N. B. BARNES
and E. J. REYNOLDS, as Directors, and
R. B. SHAW, as Treasurer of Said EMMETT
IRRIGATION DISTRICT,

Defendants.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS,
That we, J. PAUL THOMPSON of the City of
Cleveland, State of Ohio, as principal in this obligation,
and the BOISE TITLE AND TRUST COMPANY, a corporation with its principal place of
business at Boise, Idaho, as surety, are held and
firmly bound unto the above-named defendants in
the sum of Five Hundred Dollars (\$500.00), for the
payment of which, well and truly to be made, we
bind ourselves and each of us, our and each of our
heirs, executors, successors and assigns, jointly and
severally, firmly by these presents.

Sealed with our seals and dated this 3d day of
September, 1914.

The condition of this obligation is such, that
WHEREAS, the above-named J. Paul Thompson
has prosecuted an appeal to the United States Cir-

cuit Court of Appeals for the Ninth Circuit to reverse the order and decree made and entered in the above-entitled suit in the District Court of the United States for the District of Idaho, Southern Division, on the 2d day of September, 1914. [42]

NOW, THEREFORE, if the above-named plaintiff and appellant, J. Paul Thompson, shall prosecute his said appeal to effect and answer all costs if he shall fail to make his said plea good, then the above obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

IN WITNESS WHEREOF, the said Principal has caused his name to be hereunto subscribed by one of his solicitors, and the said Boise Title and Trust Company, as Surety, has caused its name to be hereunto subscribed by its duly authorized officers, and its corporate seal affixed.

(Signed) J. PAUL THOMPSON,

By OLIVER O. HAGA,

His Solicitor.

BOISE TITLE AND TRUST COMPANY,

By S. H. HAYS,

President.

[Seal] Attest: (Signed)

RAYMOND S. HOOVER,

Secretary.

Approved September 3d, 1914.

FRANK S. DIETRICH,

District Judge.

[Endorsed]: Filed Sept. 3, 1914. A. L. Richardson, Clerk. [43]

Citation [on Appeal (Original)].

THE UNITED STATES OF AMERICA,—ss.
To Emmett Irrigation District and to W. H. Shane,
N. B. Barnes, and E. J. Reynolds, as Directors,
and R. B. Shaw, as Treasurer of Said Emmett
Irrigation District:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco in the State of California, within thirty (30) days from the date of this Writ, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the District of Idaho, Southern Division, wherein J. Paul Thompson is plaintiff and you, the Emmett Irrigation District and W. H. Shane, N. B. Barnes and E. J. Reynolds as directors, and R. B. Shaw as treasurer of said Emmett Irrigation District, are defendants, to show cause, if any there be, why the judgment, order or decree in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable FRANK S. DIETRICH, United States District Judge for the District of Idaho, this 3d day of September, A. D. 1914, and of the Independence of the United States the one hundred and thirty-ninth year.

FRANK S. DIETRICH,

District Judge.

[Seal]

Attest: A. L. RICHARDSON,

Clerk. [44]

Service of the foregoing Citation and receipt of a copy thereof admitted this 3d day of September, 1914.

WOOD & DRISCOLL,
J. M. THOMPSON,

Solicitors for Defendants. [45]

[Endorsed]: No. 479. In the District Court of the United States for the District of Idaho, Southern Division. J. Paul Thompson, Plaintiff, vs. Emmett Irrigation District et al., Defendants. Citation. Filed Sept. 3, 1914. A. L. Richardson, Clerk.

Return to Record.

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

[Seal]

Attest: A. L. RICHARDSON,

Clerk. [46]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

*In the District Court of the United States for the
District of Idaho, Southern Division.*

J. PAUL THOMPSON,

Plaintiff,

vs.

EMMETT IRRIGATION DISTRICT, a Municipal
Corporation, W. H. SHANE, N. B. BARNES
and E. J. REYNOLDS, as Directors, and
R. B. SHAW, as Treasurer of Said EMMETT
IRRIGATION DISTRICT,

Defendants.

I, A. L. Richardson, Clerk of the District Court of the United States for the District of Idaho, do hereby certify that the above and foregoing transcript of pages numbered from 1 to 47, inclusive, contain true and correct copies of the Complaint, Amendment to Complaint, Motion to Dismiss Bill of Complaint as Amended, Decision on Motion, Decree Dismissing Bill, Assignment of Errors, Petition for Appeal, Order Allowing Appeal, Bond on Appeal, Original Citation, Return to Record and Clerk's Certificate, which together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the record herein amounts to the sum of \$27.80 and that the same has been paid by the Appellant.

Witness my hand and the seal of said court, affixed
at Boise, Idaho, this 4th day of September, 1914.

[Seal]

A. L. RICHARDSON,

Clerk. [47]

[Endorsed]: No. 2479. United States Circuit
Court of Appeals for the Ninth Circuit. J. Paul
Thompson, Appellant, vs. Emmett Irrigation Dis-
trict and W. H. Shane, N. B. Barnes and E. J. Rey-
nolds, as Directors, and R. B. Shaw, as Treasurer of
Emmett Irrigation District, Appellees. Transcript
of Record. Upon Appeal from the United States
District Court for the District of Idaho, Southern
Division.

Received and filed September 8, 1914.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

No. 2479

United States
Circuit Court of Appeals
For the Ninth Circuit.

J. PAUL THOMPSON, Appellant.

VS.

EMMETT IRRIGATION DISTRICT and W. H. SHANE,
N. B. BARNES and E. J. REYNOLDS, as Direct-
ors, and R. B. SHAW as Treasurer, of Emmett
Irrigation District,

Appellees.

Brief of Appellant.

On Appeal from the United States District Court for the
District of Idaho, Southern Division.

J. H. RICHARDS,
OLIVER O. HAGA,
McKEEN, F. MORROW,

Solicitors for Appellant.

Residence: Boise, Idaho.

Filed

FEB 5 - 1915

*In the United States Circuit Court of Appeals for the
Ninth Circuit.*

No. 2479.

J. PAUL THOMPSON, *Appellant.*

vs.

EMMETT IRRIGATION DISTRICT, AND W. H.
SHANE, M. B. BARNES AND E. J. REYNOLDS, AS
DIRECTORS, AND R. B. SHAW AS TREASURER,
OF EMMETT IRRIGATION DISTRICT, *Appellees.*

BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from an order dismissing appellant's Bill. Appellant alleges in his Bill that the defendant, Emmett Irrigation District, was organized under the irrigation district laws of the State of Idaho on September 10th, 1910; that on December 3rd, 1910, the electors of the District authorized the issuance of the negotiable coupon bonds of the district to the amount of \$1,100,000.00; that thereafter all proceedings relating to the organization of the District and authorization of such bonds were confirmed by the District Court for the proper county, and on appeal the Supreme Court of the State affirmed the judgment of the District Court confirming the organization of the District and approving all proceedings relative to the authorization and issuance of said bonds; that thereafter the District sold approximately \$900,000.00 of said bonds.

That appellant, relying upon the judgment of the Supreme Court of the State confirming the proceedings for

the organization of the District and for the issuance of such bonds, and relying upon the recitals contained in such bonds, purchased for a valuable consideration, prior to January 1st, 1914, \$101,000.00 of said bonds.

That after the District had sold its bonds, the Board of Directors of the District determined the benefits which would accrue to the several tracts or subdivisions of land within the District from the sale of such bonds, and apportioned such benefits accordingly; that the action of the Board in apportioning such benefits was approved by the District Court for the proper county on the — day of June, 1913, and that such decree has become final.

That the interest maturing on such bonds on January first and July first, 1913, has been paid, but that the interest coupons maturing January 1st, 1914, have not been paid; and that appellant is the owner of coupons maturing January 1st, 1914, to the amount of \$3,030.00. That on October 22nd, 1913, the Board of Directors of the District levied an assessment against all the lands in the District for the payment of the interest maturing January first and July first, 1914; that a large number of the land owners and taxpayers in the District *paid* the taxes so levied and assessed against their lands for the payment of interest on the bonds held by appellant and other bondholders.

That the District and its officers failed and neglected to use the money so collected for the payment of such interest, but allowed default to be made on all coupons maturing January 1st, 1914.

That appellant on January 9th, 1914, tendered his coupons to the Treasurer of the District and demanded payment thereof, but the Treasurer, notwithstanding he had in

his possession and in his custody and control the interest fund of the District, collected for the payment of such coupons, to an amount exceeding the face value of the coupons so tendered, declined to use such interest money for the payment of appellant's coupons, and declined to pay any of such coupons.

That defendants wrongfully and without cause declined to apply the interest money collected from the taxpayers of the District to the payment of interest on the bonds, and that unless defendants be enjoined and restrained they will return such money to the persons from whom the same was collected, or will divert such money to other purposes and will not apply it to the payment of interest or to the purpose for which it was levied and collected.

That under the laws authorizing the issuance of such bonds nothing but interest thereon will be paid during the first ten years, and that thereafter a small per cent of the bonds must be retired each year for a period of ten years, to the end that the entire issue will be paid off at the end of the twentieth year. That default in the future installments will be made by the defendants from time to time as each installment matures. That should appellant and other holders of said bonds be compelled to bring suit on each installment of interest as the same becomes due, or for the principal as the same becomes due, numerous suits will be required; and if the bringing of such suits be delayed until all of the bonds have matured irreparable injury will be sustained by the bondholders because of loss of interest and the uncertainties and unsettled conditions which will prevail in the meantime, and which will wholly destroy the market value of the bonds. That it will be impossible for the District and the taxpayers thereof to pay the whole of said issue and accumulated interest by one

assessment; that the same can only be paid serially as provided in the law.

That in order to protect appellant and other bondholders, it is necessary that the validity of the bonds should be determined immediately, and that they have appropriate process for enforcing the payment of interest and principal as the same become due.

That the defendants are counseling and advising the taxpayers of the District not to pay their taxes, and are making no effort to collect the same, but they are encouraging by their actions and statements default in the payment of such taxes and are encouraging agitation and litigation against the bondholders, and fomenting a spirit of repudiation among the taxpayers, with a view of ultimately repudiating the bonds, and inviting suits by taxpayers, attacking the validity of the bonds and the right of the District to pay interest thereon, and by such actions and conduct are greatly depreciating the market value of the bonds and causing irreparable injury to appellant and other bondholders.

That defendants sometimes contend that about one-fifth of the bonds issued were sold without consideration, or without adequate consideration; but defendants do not state or pretend to know what bonds were so issued, and do not identify them by number or otherwise so that bondholders or others can ascertain what bonds it is claimed were illegally sold or were issued without consideration. That such statements of the District officers are being widely circulated, and are frequently made and repeated, and as a result thereof the taxpayers are defaulting in the payment of their taxes.

That statements have repeatedly been made by the defendants that the District will not pay said bonds unless

compelled to do so by a decree or judgment of the Court; that the contentions, agitations and controversies over such bonds are becoming general throughout the District, and are being circulated by taxpayers and officers of the District among financial institutions and investors dealing in such bonds; that numerous suits will be instituted by taxpayers attacking the validity of such bonds and the validity of the assessments levied for the payment of such interest. That one such suit has already been instituted in the District Court of the State, wherein it is sought to restrain the Treasurer of the District from collecting or attempting to collect any tax from plaintiff in such suit; that other like suits will be instituted at any time; that in such suits judgments may be entered against the District or the officers thereof, affecting the validity of the bonds and the collection of taxes, without notice to or knowledge thereof by the holders of the bonds, who are widely scattered and who reside mostly, if not entirely, in other States and at such distances from the place where such suits will be brought that they could not, except by the merest chance, learn that such suits have been brought or were pending. That because of the defendants' attitude towards the bonds, no adequate or proper defense to such suits will be made by the defendants.

That appellant is an innocent holder for value, without notice, and that unless defendants be restrained and enjoined they will either divert or appropriate to other uses, or return to the taxpayers, the moneys collected for the payment of interest on the bonds, and will allow default to be made in the steps and proceedings required to make legal or valid the sale of property in the District for delinquent taxes, and will permit the taxpayers who have paid no taxes to wholly escape the penalties of such default and escape the payment of such taxes, all of which will

render appellant's bonds and the other bonds of the District unsalable, and will greatly depreciate, if not entirely destroy, the market value thereof, and will result in numerous suits and long and protracted litigation, and otherwise cause great and irreparable injury to appellant and other bondholders.

Appellant prays for a decree enjoining defendants from diverting the interest money heretofore collected, or against using the same for any purpose except the payment of interest; that the bonds held by appellant may be decreed legal and valid obligations of the District, and that he may have judgment for the coupons now due, and that defendants may be restrained from encouraging default on the part of the taxpayers, and from doing any act or thing which may depreciate the value of the bonds, and from allowing or permitting default in the proceedings required to accomplish a valid sale of property for delinquent taxes, and that they be enjoined from instituting actions or proceedings attacking the validity of the bonds; and for such other and further relief as the nature and circumstances of the case may require.

The original Bill and amendments thereto will be found on pages 1 to 26 of the record. A motion was made to dismiss, the basis of the motion was in substance that the bill did not state a cause for equitable relief, and that appellant had an adequate remedy at law. From the order sustaining appellees' motion appellant appeals.

SPECIFICATION OF ERRORS.

Appellant assigns the following errors on his appeal herein:

1. That the Court erred in holding and deciding that appellant had an adequate remedy at law.

2. That the Court erred in holding and deciding that the facts alleged in appellant's Bill, as amended, are insufficient upon which to base equitable jurisdiction.

3. That the Court erred in holding and deciding that it was not apparent from said Bill, as amended, that an action at law would not furnish a complete and adequate remedy in said cause.

4. That the Court erred in holding and deciding that the allegations in appellant's Bill, as amended, were not sufficient to justify a conclusion that the interest collected and now in the possession of the Treasurer of said District would be diverted, and in holding and deciding that it was necessary to show either an actual diversion of such interest fund, or further facts justifying the conclusion that there would be a diversion before appellant would be entitled to equitable relief.

5. That the Court erred in holding and deciding that there was no such probability of a multiplicity of suits as to justify a court of equity to take jurisdiction of said cause.

6. That the Court erred in holding and deciding that there was no reason for concluding that, if in an action at law upon the coupons the Court should hold in favor of appellant, the appellees would in the future decline to meet other interest payments as and when they fall due.

7. That the Court erred in holding and deciding that it was not improbable that a judgment in an action at law favorable to the appellant would be as effective in quieting the agitation pleaded in the Bill, as amended, and in establishing the market value of the bonds, as a decree of a court of equity, and in declining to take jurisdiction by reason thereof.

8. That the Court erred in holding and deciding that the appellees do not repudiate their liability to rightful

bondholders, but deny only that the appellant is such holder of the bonds of which he has possession.

9. That the Court erred in ordering and decreeing that appellant's Bill, as amended, did not set forth sufficient facts to entitle appellant to relief in equity.

10. That the Court erred in ordering and decreeing that appellant's Bill, as amended, be dismissed.

POINTS AND AUTHORITIES.

Section 723 of the Revised Statutes of the United States do not restrict the ancient jurisdiction of courts of equity or prohibit their exercising a concurrent jurisdiction with courts of law in cases where such concurrent jurisdiction has been previously upheld.

Wehrman vs. Conklin, 155 U. S. 314, 323; 39 L. Ed. 167, 172.

U. S. v. Leslie, 167 Fed. 670.

Burlington Sav. Bank v. Clinton, 106 Fed. 269, 276.

1 Pomeroy on Equity Jurisprudence (3d Ed.), Secs. 182, 276-278.

16 Cyc. 34.

Jurisdiction of courts of equity over trustees and the performance of their duties has existed from the earliest times and is unaffected by statutes, and it is immaterial that courts of law may under the statutes have concurrent jurisdiction and be able to render substantially the same relief.

1 Pomeroy, Equity Jurisprudence, (3d Ed.), Secs 100.

2 Story, Equity Jurisprudence (13th Ed.) 43.

Hayden v. Douglas County, 170 Fed. 24.

Oelrichs v. Williams, 82 U. S. 211; 21 L. Ed. 43.

Appellees stand in the relation of statutory trustees towards the bondholders of the District.

Vickery v. City of Sioux City, 104 Fed. 164, 166 and 168.

Farson v. City of Sioux City, 106 Fed. 278.

Burlington Sav. Bank v. Clinton, 106 Fed. 269, 275.

Olmsted v. City of Superior, 155 Fed. 172, 178.

Spidell v. Johnson, 128 Ind. 235; 25 N. E. 889.

McQuillin on Municipal Corporations, p. 4794.

The money collected by appellees for the payment of interest on the bonds of the District constitutes a trust fund which cannot be applied or diverted to other purposes.

Section 2410 and Sec. 2406, Rev. Stat. of Idaho, and cases cited *supra*.

While a special fund is provided by law to be collected by taxation on the lands in the District in proportion to the benefits received, the bonds are nevertheless general obligations of the District; but the statutory fund required to be levied is a trust fund and it cannot be diverted or appropriated to other purposes.

1 Dillon, Municipal Corporations (5th Ed.) p. 372.

2 Dillon, Municipal Corporations, (5th Ed.) p. 1390.

Burlington Sav. Bank v. Clinton, 111 Fed. 439.

The United States v. Fort Scott, 99 U. S. 152.

Fort Madison v. Fort Madison Water Co. 114 Fed. 292.

Vickery v. Sioux City, 115 Fed. 437.

King v. Superior, 117 Fed. 113.

Superior v. Marble Sav. Bank, 148 Fed. 7.

Olmstead v. Superior, 155 Fed. 172.

5 McQuillin Munic. Corp., p. 4793.

Bondholders may have mandatory injunction or other proper process commanding a municipal corporation through its trustees to levy and collect taxes required to be levied under the law.

Burlington Sav. Bank v. Clinton, 111 Fed. 439, 446.

Injunction will issue to suppress oppressive or interminable litigations or to prevent multicentricity of suits. Such matters are special grounds of equity jurisdiction.

Ins. Co. v. Bailey, 13 Wall, 616; 20 L. Ed. 501.

Dows v. Chicago, 11 Wall. 108, 110; 20 L. Ed. 65.

State Railroad Tax Cases, 92 U. S. 575; 23 L. Ed. 663.

Nat. Bank v. Kimball, 103 U. S. 732; 26 L. Ed. 469.

6 Encyl. of U. S. Sup. Ct. Rep. 1040, and cases there cited.

When irreparable injury is spoken of, it is not meant that the injury is beyond the possibility of repair, or beyond the possibility of compensation and damages, but it must be of such constant and frequent recurrence that no fair or reasonable redress can be had therefor in a court of law.

Donovan v. Pennsylvania Co. 199 U. S. 279, 305; 50 L. Ed. 192.

Where the actions of the municipality, its officers and taxpayers are of such a character as to cast a cloud upon the security of the bondholders or on the validity of the bonds, and thereby depreciate or destroy the market value or salability of the bonds, a court of equity will take jurisdiction to remove the cloud and determine the validity of the bonds.

Spidell v. Johnson, 128 Ind. 235; 25 N. E. 889.

Voss et al. v. Murray et al. 50 Ohio St. Rep. 19.

The New York & New Haven R. R. Co. v. Schuyler.
17 N. Y. 592.

Earl v. Maxwell, 86 S. C. 1; 67 S. E. 962; 138
State Rep. 1012.

Magnuson v. Clithero, 101 Wis. 551; 77 N. W. 882.

Stebbins v. Perry County, 167 111. 567; 47 N. E.
1048.

Rosenbaum v. Foss, 4 S. Dak. 184; 56 N. W. 114.

Sherman v. Fitch, 98 Mass. 59.

It is not enough that there is a remedy at law. It must be plain and adequate and as practical and efficient to the ends of justice and to its prompt administration as the remedy in equity.

United States v. Union Pac. R. Co. 160 U. S. 51;
40 L. Ed. 319, 337.

Boyce v. Grundy, 2 Pet 210, 215.

When a court of equity has jurisdiction over a cause for any purpose, it may retain the cause for all purposes and proceed to a final determination of all the matters at issue, and may thus establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority.

1 Pomeroy, Equity Jurisprudence (3d Ed.) Sec.
181, and cases there cited.

Bisphan, Equity, Sec. 37.

ARGUMENT.

That appellant is entitled to relief is conceded, but it will be contended that he has an adequate remedy at law, and such was the decision of the District Court. The contention that the remedy at law is adequate is based on an erroneous view of the situation set forth in the bill. The

District Court assumed that judgment for the past-due coupons held by appellant was the gist of the action, when, as a matter of fact, the payment of the coupons is merely incidental to the far more important questions which must be settled and determined before appellant and other bondholders have received the protection to which they are justly entitled.

The Bill shows that the Emmett Irrigation District negotiated and sold \$900,000.00 of negotiable coupon bonds payable to bearer; that the bondholders are numerous and widely scattered. Who they are and where they are and the number of bonds held by each are matters purely of conjecture. They are unknown to each other and their identity changes from day to day.

The value of appellant's bonds is not determined and the cloud which hangs over them is not removed by the payment of the coupons maturing January 1st, 1914, aggregating \$3,030.00. To establish the value of appellant's bonds, aggregating \$101,000.00, and to remove the uncertainty and the doubt as to their validity and to determine the proportionate interest which appellant has by virtue of his ownership of these bonds in the interest funds or taxes collected by the District is far more important than the immediate payment of the interest coupons referred to.

Concerted action on the part of all bondholders is impossible for, as stated above, they are not only numerous, but they are widely scattered and are unknown to each other. Yet full and adequate remedy cannot be obtained until the validity of all the bonds negotiated by the District has been established. If the District Court be right in its decision, then appellant with his \$101,000.00 of bonds must be remediless until several hundred bondholders have separately come into Court in actions at law and prosecuted to final judgment their several claims. Until that

time and until that has been done there will be floating about in the financial circles and in the markets of the world bonds of the Emmett Irrigation District alleged or claimed to be worthless and invalid. That such claims, rumors, and charges necessarily destroy the market for all bonds of that issue and depreciate their value for all purposes cannot be denied.

Until the validity of all bonds outstanding has been determined the agitation alleged in the Bill against the payment of bond interest and the payment of taxes will continue. Until the validity of all bonds outstanding has been determined the District officers can not legally or equitably apportion the interest moneys collected from the taxpayers of the District. There can be no division pro rata among the bondholders until the amount of valid bonds has been determined or ascertained. The fund now on hand for the payment of interest being insufficient to pay the interest on all the bonds outstanding cannot be pro rated or paid over to appellant even on a judgment of law until the Court has determined the validity of all the outstanding bonds. It seems clear that a judgment at law on appellant's coupons would be wholly ineffectual. Even if the coupons were paid in full appellant should in equity be entitled to have the other uncertainties and doubts hanging over his securities determined once and for all, so that their market value may be reestablished and the possibility of contest in the future removed.

The bill shows the agitation in the District and the action being taken by appellees and the taxpayers. It shows that the interest tax was levied and has been partially collected; that the benefits received from the sale of the bonds have been apportioned among the land owners in the District in proportion to the benefits received and

that the taxes have been levied on that basis; that appellees, unless enjoined or restrained from so doing, will not take the other necessary steps required to collect the delinquent taxes, and that the interest collected from the land owners and now in the treasury of the District will be applied or diverted to other purposes, and not to the purposes for which it was collected; that judgments may be taken or entered in the State Courts in actions or suits between the taxpayers and the District declaring the bonds invalid, without notice to or knowledge thereof by the bondholders until after judgment has been entered. It would seem that a holder of these bonds should not be at this constant, imminent and menacing peril.

If the matter has to be determined in actions at law, as contended by appellees and as held by the District Court, there must necessarily be as many actions at law as there are bondholders, and the present uncertainty and injustice must continue until the most dilatory bondholder has come into Court and submitted his case to final judgment.

We submit that a full and comprehensive view of the situation confronting the bondholders must lead to the conclusion that the remedy at law is clearly insufficient and that there is here a just cause for equitable jurisdiction. It can not be denied that the remedy at law is neither as adequate or as full or complete as the relief that may be had in equity.

The Supreme Court, in *United States v. Union Pacific R. R. Co.* 160 U. S. 1; 40 L. Ed. 319, in considering whether the remedy at law in that case was sufficiently effectual to oust a court of equity of jurisdiction, said:

“It can not be doubted that the Government could lawfully proceed by mandamus against the railway company for the purpose simply of compelling it to perform any duty imposed by charter or by statute.

But that remedy would not afford the United States the full relief to which it is entitled. Here are agreements between the railway company and the telegraph company that are wholly inconsistent with the present claims of the Government. Until cancelled—because inconsistent with the Act of 1888, and prejudicial to the rights of the Government and the public—by decree to which the telegraph company is a party, those agreements constitute an obstacle in the way of the enforcement of that act and the protection of those rights. In a mandamus proceeding by the Government against the railway company, the telegraph company could not properly be made a defendant, and no judgment in mandamus, as between the United States and the railway company, would conclude the rights of the telegraph company. The United States is certainly entitled to the interposition of equity for the cancellation of the agreements under which the telegraph company asserts rights inconsistent with the Act of 1862 and the Acts amendatory thereof, as well as with the Act of 1888. *Jurisdiction in equity being acquired for that purpose, the Court, in order to avoid a multiplicity of suits, can proceed to a decree that will settle all matters in dispute between the United States, the railway company, and the telegraph company, which relate to the general subject of telegraphic communication between the points named by Congress.*" (Our italics).

The Court then quotes with approval from *Boyce v. Grundy*, 28 U. S. 210, 215, as follows:

"It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and effectual to the ends of justice and its prompt administration as the remedy in equity."

The Court, referring to the case of *Oelrichs v. Spain*, 82 U. S. 211, 228, says that in that case:

"An objection was raised that the remedy at law was ample. The Court, observing that the remedy at law was not as effectual as in equity, said, among other things, that a '*direct proceeding in equity will save time, expense, and a multiplicity of suits, and settle finally the rights of all concerned in one litigation.*'" (Our italics).

The Court, referring to the jurisdiction of equity in cases where the remedy at law is not equally adequate, says:

"These principles are abundantly sustained by the authorities. In 1 Pom. Eq. Jur., Sec. 181, many adjudged cases are cited in support of the proposition that 'if the controversy contains any equitable feature, or affords any purely equitable relief, which would belong to the exclusive jurisdiction, or involves any matter pertaining to the current jurisdiction, by means of which a court of equity would acquire, as it were, a partial cognizance of it, the Court may go on to a complete adjudication, and may thus establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority.'"

In the case at bar there is no dispute over the facts. Appellee's motion admits the facts as pleaded in appellant's bill. It is admitted that the bonds were sold for a valuable consideration; that the benefits were received by the District and apportioned among the land owners as provided by the irrigation district laws,—Section 32 99 of the Idaho Revised Codes (Set out in full in the appendix).

Under the Idaho statutes the officers of the District must levy an assessment annually for the payment of interest, and at the expiration of ten years an additional per cent. must be levied annually for the redemption of the principal. The tax is levied and paid in proportion to the benefits received from the improvements constructed or purchased from the proceeds of the bonds. In carrying out the provisions of the statute for levying and collecting assessments for the payment of interest and principal of the bonds (Section 2410 of the Revised Codes set out in the appendix of this brief), the officers of the District are acting in a fiduciary capacity, in the interest and for the benefit of the bondholders. They constitute the statutory machinery provided by law for levying the tax, conserving

the interest fund, and apportioning it as the interest coupons mature and are presented for payment. The fund is a fund levied and paid in for a special purpose and it can not be diverted or used for other purposes. The bill shows that the District has in this fund a sum considerably in excess of \$3,030.00, but that it declines to use it for the payment of interest or for the purpose for which it was collected.

Dillon, in his excellent work on Municipal Corporations, Vol. 2 (5th Ed.), p. 1395, says:

"If a municipality collects a special assessment or fund out of which the bonds are payable, it holds such fund for the benefit of the creditors entitled to enforce the obligations of the bonds, and when it has the money in its treasury, it cannot refuse to pay the obligations on the ground that the assessments are invalid or because the bonds are illegal upon grounds which inure to the benefit of the persons subject to assessment only. Among the remedies to which holders of improvement bonds are entitled is a suit in equity against the municipality and its officers for an accounting of the money which has been received from assessments and which has come into the general funds of the municipality, and in such action the bondholders may have a decree compelling the officers charged with the duty of collecting the assessments to perform their duty in that regard, on the principle that where a court of chancery takes jurisdiction of the cause for any purpose it retains it for all purposes and administers complete relief as the justice of the case may require."

The money collected for the payment of interest and now held by the District is not sufficient to meet the interest on all the bonds outstanding, but the holders of the valid bonds are entitled to their proportionate part of the money collected. Being a trust fund, it must be equitably pro rated among all the bondholders or persons entitled to share therein.

The Supreme Court of the United States, in *Oelrichs v. Williams*, 15 Wall 211; 21 L. Ed. 43, had before it a similar situation, and there, as here, it was contended that there was an adequate remedy at law. The Court there said :

“Upon looking into the record it is clear to our minds, not only that the remedy at law would not be as effectual as the remedy in equity, but we do not see that there is any effectual remedy at all at law. If the injunction bonds were sued upon at law and the judgment recovered, the proceeding in equity would still be necessary to settle the respective rights of the several obligees to the proceeds. The direct proceeding in equity will save time, expense, and a multiplicity of suits, and settle finally the rights of all concerned in one litigation. *Besides, there is an element of trust in the case, which, wherever it exists, always confers jurisdiction in equity.*” (Our italics).

The Court further said :

“Equity would have distributed the proceeds, if need be, according to its rights and the equity of the other parties in interest. In this case equity follows the law as regards the liability of the appellants, and having the proceeds in hand, will distribute them in this proceeding.” (Citing cases).

In *Clews v. Jamieson*, 182 U. S. 461; 45 L. Ed. 1183, the Supreme Court again held that the bill was maintainable in equity because there was an element of trust in the case. It cites *Oelrichs v. Williams*, *supra*, and says :

“The Court (meaning in *Oelrichs v. Williams*) remarked that there being an element of trust in the case, that element, wherever it exists, always confers jurisdiction in equity.”

And discussing generally the principles that should control in determining whether equity will take jurisdiction

because it can afford more adequate relief than a court of law, the Court said :

“Pomeroy in his work on Equity Jurisprudence, second edition, instances, among other equitable estates and interests which come within the jurisdiction of a court of equity, those of trusts. In Volume 1, at Sec. 151, he says: ‘The whole system fell within the exclusive jurisdiction of chancery; the doctrine of trusts became and continues to be the most efficient instrument in the hands of a chancellor for maintaining justice, good faith, and good conscience; and it had been extended so as to embrace, not only lands, but chattels, funds of every kind, things in action and moneys.’

“All possible trusts, whether express or implied, are within the jurisdiction of the chancellor. In this case the committee, as trustee, was charged with the performance of some active and substantial duty in respect to the management and payment of the funds in its hands, and it was its duty to see that the objects of its creation were properly accomplished. *The fact that the relief demanded is a recovery of money only, is not important in deciding the question as to the jurisdiction of equity.* The remedies which such a court may give ‘depend upon the nature and object of the trust; sometimes they are specific in their character, and of a kind which the law courts cannot administer, but often they are of the same general kind as those obtained in legal actions, being mere recoveries of money. A court of equity will always, by its decree, declare the rights, interest, or estate of the *cestui que trust*, and will compel the trustee to do all the specific acts required of him by the terms of the trust. It often happens that the *final* relief to be obtained by the *cestui que trust* consists in the recovery of money. This remedy the courts of equity will always decree when necessary, whether it is confined to the payment of a single specific sum or involves an accounting by the trustee for all that he has done in pursuance of the trust, and the distribution of the trust moneys among all the beneficiaries who are entitled to share therein.’ 1 Pom. Eq. Jur. Sec. 158.”

In *Vickrey v. Sioux City*, 104 Fed. 164, the Court had before it a situation quite similar to the one at bar, though it would seem that the demand there for equitable relief was by no means as strong as it is here. There, as here, a special assessment had been made for the payment of the outstanding bonds. It was contended that the bondholders were equitably the owners of the money in the city treasury collected under the special assessment, and complainant prayed for his proper share of the fund, for a judgment against the city for the balance, and for an injunction restraining the diversion of the fund and from paying out any of the money in the special fund until complainant's rights had been duly awarded and decreed. Defendant demurred to the bill and urged that complainant had a sufficient remedy at law. The Court said:

"It cannot be well questioned that the bonds sued on contain an absolute promise on behalf of the city to pay the amounts thereof to the payee or bearer, and, therefore, it is true that in an action at law the holders of the bonds could recover judgment for the sums due thereon against the city. It is equally true that, under the provisions of the act of the general assembly authorizing the issuance of the bonds, the city assumed the duty of creating and properly applying the sinking fund provided for in the act, and to that end was charged with the duty of levying the special assessments called for by the act, collecting the same, and making proper payment thereof to the bondholders. In these particulars the city is charged with a duty amounting to a trust. The inducement held out to the purchasers of the bonds was that the payment thereof would be provided for by the levy and collection of the special assessments upon the property abutting on the improved streets and alleys, and the bondholders have the right to call the city to account for the manner in which this trust duty has been performed. Thus, in *Taylor v. Benham*, 5 How. 232-274; 12 L. Ed. 130, it is said:

"Every person who receives money to be paid to another, or to be applied to a particular purpose, to

which he does not apply it, is a trustee, and may be sued either at law, for the money had and received, or, in equity, as a trustee, for a breach of trust.' "

In *Burlington Sav. Bank v. Clinton*, 106 Fed. 269, suit was brought in equity by a holder of improvement bonds, and there, as here, the defendant contended that there was an adequate remedy at law, that a judgment should first be obtained for the amount due upon which mandamus could issue to enforce the levy of the necessary tax. The Court held that the bondholder was entitled to broader relief than could be obtained in the law action. Among other things, the Court said :

"Even though it were true that a legal remedy did exist, that would not defeat the right to invoke the jurisdiction in equity, provided it be a fact that the relation held by the City of Clinton in the matter of imposing taxes to meet the indebtedness of Lyons City is that of a trustee. In such case the legal and equitable remedies would be concurrent, and either could be available of by complainant. *Townsend v. Vanderwerker*, 160 U. S. 171, 40 L. Ed. 383."

In *Farson v. Sioux City*, 106 Fed. 278, the question was again before the Court by the holder of bonds payable by special assessment, and again the Court held that jurisdiction existed in equity. The Court said :

"It is clear that if the relation imposed upon the city with respect to the levying, collecting, and disbursement of the special taxes authorized by the act is that of a trustee, then the equitable jurisdiction cannot be questioned, and it seems equally clear that the city is a trustee with respect to the fund necessary to be raised to pay the bonds in question. Every element necessary to create a trust relationship is found in the duty imposed upon the city, it having chosen to undertake the improvement of its streets under the provisions of the act of the 20th general assembly, and having thereby obligated itself to impose, collect, and disburse the taxes provided for in the act for the

benefit of persons purchasing the bonds. This being the fact then, as is ruled by the supreme court in *Case v. Beauregard*, 191 U. S. 688, 25 L. Ed. 1004, 'it may be said that whenever a creditor has a trust in his favor, or a lien upon property for the debt due him, he may go into equity without exhausting legal processes or remedies.' The averments of the bill show clearly that the case comes within the jurisdiction of equity, and that the remedy sought can only be reached through the process of a court of equity."

In *Olmstead v. City of Superior*, 155 Fed. 172, this question was again before the Court. The contentions urged by appellees here were urged there, and apparently fully discussed, for the Court says that, "counsel on all sides have displayed such industry and learning in the argument of this cause, the Court feels called upon to discuss the several contentions at somewhat greater length than it would ordinarily do." Taking up the identical question now under consideration, the Court said:

"The first ground of demurrer requires but slight attention. The supplemental bill of complaint, as we read it, is properly planted in equity, and a court of law could afford no adequate relief in the premises. From the bill it satisfactorily appears that the city assumed the duty to create, administer and distribute a certain fund derived from special assessments on certain real estate, which fund was pledged for the payment of these bonds; that thereby the city became a statutory trustee, bound to preserve this fund and administer it solely and exclusively for this special purpose; that in violation of this duty, the defending city has by various methods particularly set out in the bill, encroached upon, appropriated and misapplied the funds, and has neglected and refused to pay the bonds in suit that were made a lien upon such fund. * * * It is apparent that complainant is entitled to relief, which is the peculiar province of equity to afford, and that a court of law would be powerless in the premises."

The Court cites with approval *Vickrey v. Sioux City*, and *Farson v. Sioux City*, *supra*.

The special fund before the courts in the cases cited above constituted no more a trust fund than does the special fund created by the Idaho statutes for the payment of the interest on appellant's bonds. And it is wholly immaterial whether the bonds are general obligations of the District, or can be paid **only out of** the special fund. Whether the special fund provided is the *exclusive* fund from which the bonds and interest can be paid is not important. It is sufficient that the law creates a special fund and the machinery for levying and collecting such fund, and that such fund has been collected, in whole or in part, and that it is not being applied to the purposes for which it was collected.

Many courts have held, in fact we know of no decision to the contrary, that when the taxpayers who have received the benefits of the improvement have paid their assessments into the special fund for the purpose of paying their pro rata part of the interest or principal of the outstanding bonds, neither the municipality nor the officers thereof can question the validity of the bonds, or the right of the bondholders to the money in such fund. The officers and the municipality are in such cases purely statutory trustees charged with the duty of apportioning the fund among the bondholders as their respective interests may appear.

McQuillin, in his late work on *Municipal Corporations*, Vol. 5, p. 4793, says:

"While improvement bonds do not ordinarily create any personal liability against the municipality to pay them from general funds, and hence in such a case an action cannot be brought on the bonds to recover a general judgment against the municipality for the amount thereof, yet if the bond does not on its face purport to be payable only from the special fund, and the statute authorizing the bond issue does not limit

the power to issue to bonds which shall be payable from the special fund created by the collection of special assessments, it is payable from general funds, and an action may be brought thereon against a municipality and a general judgment recovered. *However, in any event, the municipality is liable as a trustee for failure to collect and apply the assessment.* * * *

The Circuit Court of Appeals for the Seventh Circuit, in *Jewel v. City of Superior*, 135 Fed. 19, referring to the trust character of the funds collected under special statutory provision for the payment of interest and principal of outstanding bonds, says:

"The fifth assignment questions the action of the trial court in limiting the amount of his recovery to his pro rata share of the funds to which the holders of all the bonds are entitled. This fund, derivable from the assessments, was a trust fund, pledged to the payment of all of the bonds. The right of the appellant therein was only to such portion of the fund realized as the sum of his bonds bore to the entire amount of the issue of bonds. It is true that equity favors the vigilant, not the slothful; but we think it would be a manifest perversion of equity to require a trustee to commit a breach of trustee owing to *cestuis que trustent*, by taking from other bondholders and awarding to the appellant so much of the sum as would pay his bonds in full. We know of no principle of equity which would warrant such a decree."

The case of *Spidell v. Johnson*, 128 Ind. 235, seems directly in point. In that case bonds had been issued for certain road improvements. A controversy later arose over the payment of the taxes, and default was made on the bonds. Some of the taxes had been collected, but the money was not applied to the purposes for which the taxes had been levied and paid. The Court said:

"The facts stated in the complaint invoke the chancery jurisdiction of the court for an accounting between officers and creditors of Ripley County with

the appellants, in respect to an alleged fund which the latter claims should in equity be applied to the payment of the bonds held by them.

"The proceedings for the construction of the public enterprise in question having resulted in fixing a lien on the lands adjudged to be benefited by the construction of the free turnpike, the lien thus fixed stood as a security for the payment of the bonds which were issued for the purpose of obtaining the money with which to carry forward the work. * * *

"Unless the proceedings which resulted in creating the lien which constituted the sole security for the bondholders were absolutely void, the security thereby afforded could not be destroyed, impaired, or rendered unavailing without affording an opportunity to those interested to be heard. There is no pretense that the proceedings were void. The judgments restraining the officers of Ripley County from enforcing the assessments having, as it were, cast a cloud upon the security of the bonds, they had the right to appeal to a court of equity to protect their property. Besides, some of the land owners having paid in part, and others having paid nothing, and the whole matter having fallen into a state of confusion, a court of law was not adequate to the task of unravelling the 'tangled skein,' and it was therefore peculiarly a subject for the chancery side of the court, to account with the county and its officers, to reinstate the liens of the assessments so far as the judgment theretofore rendered had embarrassed the officers of the county in collecting what might be needed to pay off the bonds and interest."

In that case judgments had been obtained against the officers, but the taxpayers enjoined the officers from making payments. The bondholders were not parties to those proceedings and had no notice that such proceedings had been instituted. The Court further said:

"So if it be found true, as is alleged, that a valid lien had attached for the security of the appellants which has been obsecured or impaired by a judgment, or by judgments to which the bondholders were not parties, the officers whose duty it is to collect the assessments should be ordered to proceed as the statute

requires to place the amount assessed upon the lands benefited upon the tax duplicate to the end that those who have not paid may be required to pay according to law."

The all-important question in this suit is not, as assumed by the District Court, the payment of the \$3,030.00 of coupons held by appellant, but the determination of the validity of the \$900,000.00 of outstanding bonds of the defendant District and the ascertainment of the respective rights of the several hundred bondholders in the moneys collected, and now held by the District, for the payment of interest on these bonds, as well as their respective rights in future moneys collected from time to time for the payment of the interest and principal of such bonds, and the removal without delay of the clouds, uncertainties and suspicions that have been cast upon all of these bonds by the action of appellees and the taxpayers of the District.

Considering the large amount of bonds outstanding, and the number of people affected by the defaults and actions of appellees as charged in the bill, and the impracticability of determining within any reasonable time, in actions at law, the rights of several hundred bondholders, it would seem that there should be no serious question about the jurisdiction of equity. In no other way can the holders of the valid bonds receive prompt, full, or adequate relief. It is peculiarly a case that cannot be confined within the strict rules and limitations that circumscribe the power of law courts.

The District Court says in effect that appellant should first take a chance on an action at law, and if he cannot there secure full relief he may then resort to equity. That defendant, before seeking aid in equity, should wait until the fund collected and now held in trust by the District has been diverted to other purposes; or until there have

been further defaults. It seems apparent that the District Court failed to appreciate the embarrassment and injustice resulting to the bondholders from the present situation; it is intolerable as it is, and it should not be necessary to wait until it gets still worse. It is difficult to see how facts can be pleaded more in detail or more specifically than is done in this bill. It shows default in the payment of the coupons. It shows that such default was intentionally created. It shows that there is a fund paid in for the exclusive benefit of the bondholders, which is held in trust by the District; that it is not being applied to the purposes for which it was paid in by the taxpayers, but, on the contrary, that appellees decline to so apply it. That instead of appellees performing their statutory duty of assisting the bondholders in the collection of the taxes, they are encouraging the defaults. That already a suit has been commenced in the State court between a taxpayer and the District, which has for its purpose the obtaining of a decree declaring the bonds invalid and the cancellation of all of the delinquent taxes. That other similar suits may be instituted at any time and carried to final judgment without notice to or knowledge thereof by the bondholders, and that no proper defense on behalf of the bondholders will be made by appellees in such suits.

It would seem that unless the Court in this suit takes jurisdiction and determines these controversies promptly a most complicated situation and interminable litigation will confront all the bondholders, the appellees and the taxpayers of the District.

Since the present suit was instituted default has been made on two additional series of coupons, viz., the coupons maturing July 1st, 1914, and January 1st, 1915; and while the record does not show it, it will not be denied that no interest tax whatever was levied by appellees in 1914.

Every six months additional defaults will be made in the payment of interest, and the bonds do not begin to mature until January 1st, 1921, when only five per cent (5 per cent) thereof become due. The last of the bonds outstanding do not mature until January 1st, 1931.

Manifestly, the bondholders cannot wait until both the principal and interest become due. In all fairness the cloud that has been cast upon the validity of their securities should be determined promptly, for as long as it remains it must be conceded that the bonds have no market value and are unsalable, and that neither the principal nor interest thereon will be paid by the District.

The District Court has suggested that some of the allegations of the bill are general conclusions. It is not clear how they could be made more specific without waiting until the situation has become hopelessly involved. This is not a case where any one individual is spokesman for all. No particular statement of any particular individual can be taken. We are dealing here with a large number of individuals, and it is the action of the community and the officers and taxpayers as a whole that is set forth in the Bill. This can only be stated in general terms. It must necessarily be in the nature of conclusions drawn from many separate and individual statements and actions.

A bill in equity in a case of this kind should not be subjected to the same rule of analysis as a criminal indictment against an individual. And there are sufficient facts admitted and conceded by the motion to entitle appellant to equitable relief. The holders of the securities issued in this case are entitled to have the uncertainties and the clouds which have been cast upon their securities

removed. They are entitled to have their interest in the trust fund determined.

Pomeroy, in his excellent work on Equity Jurisprudence, Vol. 6, Sec. 729, says:

“It has been held that a cloud upon the title to personal property, even by matter appearing of record, cannot be removed; but there seems to be no good reason for thus restricting the jurisdiction, and the instances are not infrequent where it has been exercised, in cases of void recorded chattel mortgages, spurious issues of shares of stock, etc. (Citing many authorities).”

In *Sherman v. Fitch*, 98 Mass, 59, there was a bill in equity by the assignees of an insolvent corporation praying for a decree that a recorded mortgage of personal property held by defendant might be declared void. It was alleged that a sale of the property by the assignees, while the title to it remained in dispute, would be detrimental to the creditors. It was there contended that the plaintiffs had adequate remedy at law. The Court says:

“We cannot see that the complainants, upon this state of facts, have any remedy at law. They have no cause of action against the defendant. They are in possession of the property, and he has not disturbed their possession. He might bring an action against them, but he does not choose to do it. In the meantime there is a cloud upon their title which seriously affects its value. The mortgage is upon record, and it is evident that they cannot sell the property with any prospect of obtaining its fair value, because the purchaser would know that he exposes himself to an action, if the defendant’s claim is well founded.”

The Court, after referring to another case where a bill in equity had been entertained to set aside an execution upon land in which the debtor owned a reversion, says:

“The same doctrine was affirmed in *Martin v. Graves*, 5 Allen 601; in which the general rule is

stated, that 'whenever a deed or other instrument exists, which may be vexatiously or injuriously used against a party after the evidence to impeach or invalidate it is lost, or which may throw a cloud or suspicion upon his title or interest, and he cannot immediately protect or maintain his right by any course of proceedings at law, a court of equity will afford relief by directing the instrument to be delivered up and canceled, or by making any other decree which justice and the rights of the parties may require.' 2 Story Equity, Sec. 694.

"This statement of the principle is precisely applicable to the case at bar."

In *Voss et al. vs. Murray et al.* 50 Ohio St. Rep. 19, the Court had before it a case where an attaching creditor found that the personal property attached was covered by chattel mortgages of doubtful validity but the existence of the mortgages greatly depreciated the selling value of the property, and suit was brought by the attaching creditor against the mortgagees to have the mortgages declared invalid, or, as the Court said, "to facilitate a sale of the attached property by removing what is claimed to be a cloud upon the title of the plaintiffs under their attachment." The Court, in holding that such a suit could be maintained in equity, says:

"That one who, as an attaching creditor, has acquired a lien upon personal property, may maintain a suit for the purpose of ascertaining the extent or existence of adverse claims to the same property, or removing clouds upon it that would affect its sale in the proceeding, is supported by principle as well as authority. The property being in the custody of the Sheriff under the attachment, the creditor has no possessory action against other claimants or lien holders by which the validity of their claims can be determined, and, as they may not choose to institute such an action, he is without any remedy at law, other than to sell the property subject to the clouds upon it, which is not an adequate remedy. For these reasons

similar suits have been sustained. *Sherman vs. Fitch*, 98 Mass. 59; *Jones on Chattel Mortgages*, Sec. 348."

In *Rosenbaum vs. Foss*, 4 S. Dak. 184: 56 N. W. 114, the defendant sought to remove a cloud on personal property created by a mortgage of doubtful validity. The Court, after discussing certain provisions of the statute, says:

"But an action in equity, independently of the statute, is not confined to removing clouds upon title to real property, but extends to cancellation of negotiable paper before maturity, bonds, policies of insurance, settlements, compromises, awards, judgments and chattel mortgages. (Citing many cases.) * * * We are unable to discover any principle of law that would prevent a junior mortgagee from maintaining an action to cancel a prior mortgage, void or voidable as to him, which has a tendency to lessen the value of his mortgage, or which may cause him serious injury, where, as in this State, neither party acquires title to the property, but only a lien thereon, before foreclosure and sale * * *."

In *Stebbins vs. Perry County*, 167 Ill. 567: 47 N. E. 1048, the Court had before it a suit brought by a stockholder to determine the validity of certain other stock outstanding. It was there alleged that as long as the defendant was recognized as a stockholder the stock of complainant was depreciated, and he was in danger of losing his just share of the earnings and dividends of the company; that there was danger that defendant would fraudulently assign or transfer his certificates and thereby make necessary a multiplicity of suits to enforce and establish complainant's rights. The Court held that it was a proper case for equitable interposition.

In *Earle vs. Maxwell*, 86 S. C. 1; 67 S. E. 962: 138 American State Rep. 1012, the Court had before it a case to remove a cloud from, or quiet title to, personal property

of an insolvent, to the end that the same might be sold free of the cloud or pretended claim of others. The Court said:

"While some authorities hold otherwise, we think there can be no doubt that a complaint to remove a cloud on the title to personal property may be maintained. Pomeroy's Remedies, Sec. 369. Any distinction between real estate and personal property in this respect must be purely artificial, and tend to hinder the practical administration of justice. It is true that the trustee is not in possession, and the general rule is that one out of possession, and claiming the title and right of possession, cannot maintain an action to remove a cloud on his legal title against another person in possession, for the reason that there is an adequate legal remedy by an action to recover possession when the title to land is involved, and by action of claim and delivery when the title and right of possession of personal property is involved. * * * But in this case the plaintiff is not entitled to possession, his property interest being a contingent remainder. The question which he presents to the Court is whether he has, as trustee, a right to assign this interest. If he has the right to sell a contingent interest of the bankrupt, then it is manifestly important to the trust estate that the cloud cast upon that right by the claim of the bankrupt that the purchaser will take nothing, should be cleared away before the sale. The only remedy which the plaintiff has to prevent a sacrifice sale of the trust property by reason of this claim is to ask the Court to determine his right to sell before he offers the property. The right and duty of the plaintiff to have a fair sale of the property being evident, the Court should not withhold the relief asked."

In *Magnuson vs. Clithero*, 101 Wis. 551, 77 N. W. 882, the Court had before it a case where a cloud was thrown upon the validity or ownership of a mortgage outstanding. The owner of the mortgage brought suit to have her title quieted. The plaintiff deraigned title to the mortgage through a decree of divorce, the validity of which was in doubt. After the divorce decree had been entered it was amended or corrected by a subsequent action between the

same parties. The Court, referring to the divorce proceedings through which title was deraigned, says:

“When the second action was commenced, ostensibly to correct the divorce judgment, plaintiff was in possession of the notes and mortgage, claiming title thereto, which was liable to be questioned by the mortgagor, Electa Clithero, and by Elias Magnuson as well. Under those circumstances a court of equity had jurisdiction to quiet plaintiff’s title to the property. Actions for that purpose are infrequently brought where the subject is personal property, but the jurisdiction of the Court in such cases is as well defined and as well understood as where the subject is real estate. Pomeroy’s Remedies and Rem. Rights, Sec. 369. Plaintiff’s situation was such that she had no way of remedying the mischief growing out of the threatened dispute as to her title, except to appeal to equity for a decree silencing those from whom such dispute might come. Hence upon the plainest principles of equity jurisdiction, it was in the power of the Court to entertain an action *quia timet* in plaintiff’s behalf and to make the proper decree. The complaint stated the facts requisite to a judgment setting at rest plaintiff’s fears as to her title, and the prayer, though in the main for a change in the divorce judgment, was broad enough to cover a judgment *quia timet*.”

In the case of The New York and New Haven R. R. Co. vs. Schuyler et al. 17 N. Y. 592, the Court had before it a case where officers of the corporation had issued a large amount of spurious stock. Such stock had been outstanding for many years and was in the hands of numerous persons, and on its face was in all respects like the stock legally authorized and issued. The case is substantially parallel with the case at bar, the only difference being that one relates to stock and the other to bonds. The existence of the suprious stock threw a cloud upon all stock outstanding and greatly depreciated the market value thereof. An action at law had been brought by a holder of

one of the spurious certificates, and the Court had held that they were absolutely void and that neither the corporation nor the holders of the genuine stock were affected by the spurious certificates, and that the latter were not entitled to damages or reimbursement from the corporation. Suit was brought by the corporation for the purpose of removing the cloud cast upon the genuine certificates and securing a judgment determining what certificates were valid and what were invalid. The Court says:

“There is no head of equity jurisdiction more firmly established than that which embraces the cancellation of instruments which are capable of a vexatious use if the means of defense at law may become impaired or lost, or when they are calculated to throw a cloud upon the title or interest of the party seeking relief. But the jurisdiction does not universally attach on the mere ground that the deed or other contract is invalid. * * * If, on the other hand, the invalidity does not appear on their face. The jurisdiction is not confined to instruments of any particular kind or class. Whatever their character, if they are capable of being used as a means of vexation and annoyance, if they throw a cloud upon the title or disturb tranquil enjoyment of property, then it is against conscience and equity that they should be kept outstanding, and they ought to be cancelled. These principles of general jurisprudence are believed to be decisive in favor of the right of this corporation to demand the cancellation of the false stock and to maintain a suit in equity for that purpose. On their face, as we have seen, the certificates of this stock are indistinguishable from those which are genuine and true. They confer, therefore, upon each holder a *prima facie* right as a stockholder. The evidence of such right must in every case be repelled by showing that the certificate does not represent the actual stock of the company, and it is impossible to say that the means of repelling these claims will always be as perfect as they were when the frauds in which they originated were first discovered.”

“It is true, we held in the case already mentioned, that the company could successfully defend an action

brought against it for refusing to recognize one of these certificates; but the defense rested, as it must if actions were to be brought upon any other certificate, upon the extrinsic facts to be proved. Conceding, even, that every one of these claims may be defended, at whatever distance of time and under whatever circumstances they may be pressed upon the corporation, this by no means meets the equity of the case. If, as we have held, no just claim against the corporation arises out of these certificates, it is plainly unconscionable and inequitable that they should be kept on foot. *Their very existence, outstanding, is unjust, because it must of necessity exercise a most depressing influence upon the real stock of the corporation. We all know how sensitive are values in property of this description; and what conceivable facts could cast a deeper shadow over every genuine stockholder's interest than a spurious issue of \$2,000,000 of stock, evidenced by certificates apparently valid, and under which every holder boldly and confidently asserted his claim? The fact is not alleged in the complaint, but we can scarcely err in supposing that, on the discovery of these frauds, every share of valid stock must at once have lost nearly one-half of its market value. That depression must continue, in a greater or less degree, while the certificates are allowed to stand. A decision against one of them, in an action founded upon it, is not a determination against any other one, and cannot, while the others are outstanding, restore to the genuine stock the value which justly belongs to it. To say that the share holders must remain in such a condition of insecurity and doubt, must hold their shares under such a depression, would be to sanction a species of injustice which ought to be prevented. These shares of stock are a description of property as much entitled to invoke the protective remedies peculiar to courts of remedy as any other.*" (Our italics.)

Appellant brings this suit on behalf of himself and all other bondholders of said District who may desire to join in this proceeding, and there is every reason why the controversies that have arisen and the validity of the bonds should be determined without delay, and immediate relief

granted. Delay means loss of interest to the holders of the securities in addition to the great loss in the market value thereof, and it means virtual bankruptcy to the District. For, if the interest is allowed to accumulate for a number of years, the tax that will have to be levied to meet the accumulated interest will be so large that it cannot be denied the taxpayers may not be able to bear the burden. These bonds are, under the law, made payable serially, to the end that the tax burden during any one year shall not be excessive.

Delay means loss of evidence and loss of witnesses, and it would seem to the best interest of all parties that the entire situation should be submitted to the Court with the least delay possible. For until the status of all the bonds has been determined, full relief can not be obtained by any of the bondholders. It should be noted, also, that the bonds are payable to bearer, and are not only negotiable in form but are expressly made negotiable by the statute (Sec. 2397, Revised Codes, set out in Appendix).

Wherefore, appellant submits that the order of the District Court dismissing the Bill should be set aside, and the District Court directed to hear and determine the issues raised by appellant's bill.

Respectfully,

J. H. RICHARDS,
OLIVER O. HAGA,
McKEEN F. MORROW,

Solicitors for Appellant.
Residence, Boise, Idaho.

APPENDIX.

Provisions of Idaho Revised Codes relative to irrigation district bonds and apportionment of benefits:

Form of Bonds.

"Section 2397. The bonds authorized by any vote shall be designated as a series and the series shall be numbered consecutively as authorized. The portion of the bonds of a series sold at any time shall be designated as an issue, and each issue shall be numbered in its order. The bonds of each issue shall be numbered consecutively, commencing with those earliest falling due, and they shall be designated as eleven year bonds, twelve year bonds, etc. They shall be negotiable in form and payable in money of the United States as follows, to-wit: At the expiration of eleven years from each issue, five per cent of the whole number of bonds of such issue; at the expiration of twelve years, six per cent; at the expiration of thirteen years, seven per cent; at the expiration of fourteen years, eight per cent; at the expiration of fifteen years, nine per cent; at the expiration of sixteen years, ten per cent; at the expiration of seventeen years, eleven per cent; at the expiration of eighteen years, thirteen per cent; at the expiration of nineteen years, fifteen per cent; at the expiration of twenty years, sixteen per cent; *Provided*, That such percentages may be changed sufficiently so that every bond shall be in an amount of one hundred dollars or a multiple thereof, and the above provisions shall not be construed to require any single bond to fall due in partial payments. Interest coupons shall be attached thereto, and all bonds and coupons shall be dated on January first or July first next following the date of their authorization and they shall bear interest at a rate of not to exceed seven per cent per annum, payable semi-annually on the first day of January and July of each year. The principal and interest shall be payable at the place designated therein. Said bonds shall be each of the denomination of not less than one hundred dollars nor more than one thousand dollars, and shall be signed by the president and secretary, and the seal of the board of directors shall be affixed

thereto. Coupons attached to each bond shall be signed by the secretary. Said bonds shall express on their face that they were issued by the authority of this title, naming it, and shall also state the number of the issue of which such bonds are a part. The secretary and treasurer shall each keep a record of the bonds sold, their number, the date of sale, the price received, and the name of the purchaser. * * *

Apportionment of Benefits.

"Sec. 2399. Whenever the electors shall have authorized an issue of the bonds as hereinbefore provided, the board of directors shall examine each tract or legal subdivision of land in said district, and shall determine the benefits which will accrue to each of such tracts or subdivisions from the construction or purchase of such irrigation works; and the cost of such works shall be apportioned or distributed over such tracts or subdivisions of land in proportions to such benefits; and the amount so appropriated or distributed to each of said tracts or subdivisions shall be and remain the basis for fixing the annual assessments levied against such tracts or subdivisions in carrying out the purpose of this title. Such board of directors shall make, or cause to be made, a list of such apportionments or distribution, which list shall contain a complete description of each subdivision or tract of land of such district with the amount and rate per acre of such apportionment or distribution of cost, and the name of the owner thereof; or they may prepare a map on a convenient scale showing each of said subdivisions or tracts with the rate per acre of such apportionment entered thereon; *Provided*, That where all lands on any map or sections of a map are assessed at the same rate a general statement to that effect shall be sufficient. Said list or map shall be made in duplicate and one (1) copy of each shall be filed in the office of the State Engineer and one (1) copy shall remain in the office of said board of directors for public inspection. Whenever thereafter any assessment is made either in lieu of bonds, or any annual assessment for raising the interest on bonds, or any portion of the principal, it shall be spread upon the lands in the same proportion as the assessment of

benefits, and the whole amount of the assessment of benefits shall equal the amount of bonds or other obligations authorized at the election last above mentioned."

Payment of Bonds and Interest.

"Sec. 2405. Said bonds and the interest thereon shall be paid by revenue derived from the annual assessment upon the land in the district; and all the land in the district shall be and remain liable to be assessed for such payment."

Levy of Assessment.

"Sec. 1410. At its regular meeting in October, the board of directors shall levy an assessment upon the lands in said district upon the basis, and in the proportion, of the list and apportionment of benefits approved by the court as hereinbefore provided, which assessment shall be sufficient to raise the annual interest on the outstanding bonds. At the expiration of ten years after the issue of said bonds of any issue, the board must increase said assessment, as may be necessary from year to year, to raise a sum sufficient to pay the principal of the outstanding bonds as they mature. The secretary of the board must compute and enter in a separate column of the assessment book the respective sums, in dollars and cents, to be paid as an assessment on the property therein enumerated. When collected, the assessment shall be paid into the district treasury, and shall constitute a special fund, to be called 'Bond Fund of.....Irrigation District.' In case any assessment should be made for the purpose contemplated by a bond authorization, it shall be entered in a separate column of the assessment book in the same manner as the bond fund; and when collected shall constitute the 'Construction Fund of.....Irrigation District.'"



United States
Circuit Court of Appeals
For the Ninth Circuit

J. PAUL THOMPSON,

Appellant,

vs.

EMMETT IRRIGATION DISTRICT and W. H.
SHANE, N. B. BARNES and E. J. REYNOLDS,
as Directors, and R. B. SHAW, as Treasurer, of
Emmett Irrigation District,

Appellees.

BRIEF OF APPELLEES

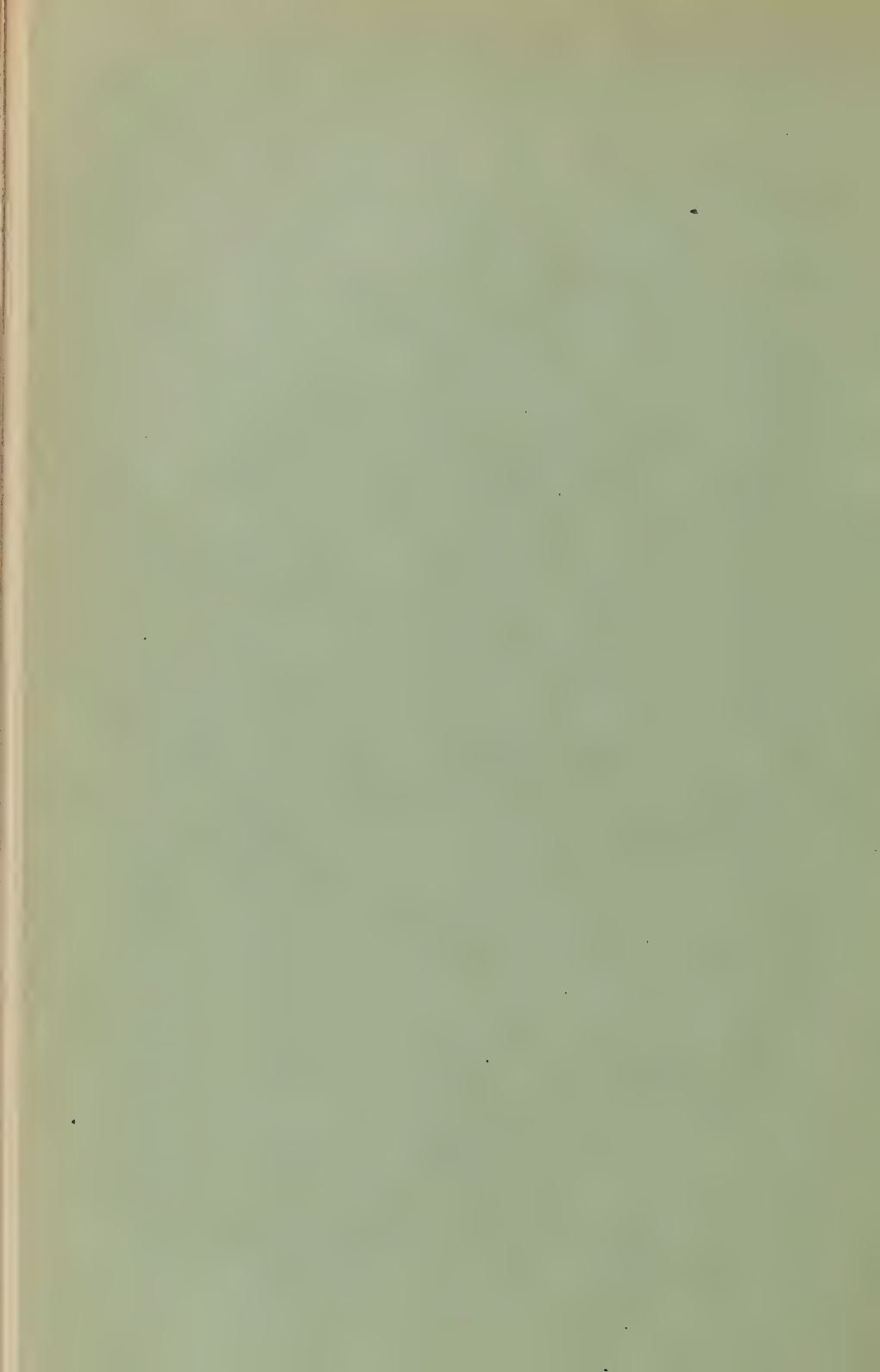
*Upon Appeal from the United States District Court
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J. M. THOMPSON, Caldwell, Idaho,
FREMONT WOOD,
DEAN DRISCOLL,

Residence, Boise, Idaho.

Solicitors For Appellees

Filed



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STATEMENT.

The appellant's statement as to the facts of this controversy is substantially correct. Some statements are made in the brief, as to matters entirely outside the record in the case, as for instance the opening sentence of the argument, on page eleven of the brief, to the effect that it is conceded that appellant is entitled to relief, and the statement at the bottom of page 27, to the effect that default has been made on coupons maturing subsequently to the filing of the bill herein and no interest levied; as to which we do not wish to be held to have conceded the facts, nor that any such matter is before the court at this time. From appellees' standpoint the statement should also be supplemented by calling atten-

tion, more emphatically than has been done, to the fact that, stripped of all surplusage, the bill in this action states merely a cause of action for recovery of a money judgment on interest coupons of the Irrigation District bonds, or, in other words, the bill sets up a state of facts which, if true, would be remedied by a law court, by compelling the directors of the irrigation district to perform their statutory duty of levying, collecting and paying over the proper assessment for the interest coupons.

Inserted in the bill, however, with this cause of action, on the coupons alone, are a large number of the most general allegations, many of them mere conclusions of the pleader and most of them made only upon information and belief, to the effect that default on coupons not yet due will be made in the future; that many suits will be required by the bondholders as the coupons mature; that the directors by their action, conduct and statements are encouraging the repudiation of the bonds and coupons and the instigation of suits attacking them; further, that the defendants allege that one-fifth of the bonds are issued without consideration and will not be paid until compelled by a judgment. (Par's. 16-17-18 of bill, pp. 16 to 19 of Trans., and Par. 19 of the amended bill, pp. 23-26 inc. of Transcript). On these allegations, most of which concern not the coupons now due but the bonds themselves, which are not due and on which no recovery is asked, the court below was asked to take jurisdiction on the equity side, and this in the face of the fact that it affirma-

tively appears on the face of the bill itself that every step required by law in the levy and collection of the taxes to pay the interest up to the date of filing of the bill had been taken by the directors. The court is asked, not only to compel the payment of the appellant's coupons now due but to enter a decree which in substance amounts to a decree quieting title to appellant's bonds. (Trans. pp. 20 and 21). Appellees here, defendants below, object to the jurisdiction of the court on the equity side, on the ground that the plaintiff has an adequate remedy at law. (See motion to dismiss, pp. 27 to 30 inc. Trans. and especially Par. 4 of said motion, p. 29). The contention was sustained below. (Decision pp. 31 to 39, Trans.)

ARGUMENT.

An irrigation district is a public, quasi municipal corporation, under the laws of Idaho, as well as under the Wright Act of California, from which the Irrigation District Law of Idaho was largely taken. *Pioneer Irrigation District vs. Walker*, 20 Ida., 605, 119 Pac. 305; *Colburn vs. Wilson, et al.*, 23 Ida. 337, 130 Pac. 381; *City of Nampa vs. Nampa and Meridian Irrigation District*, 19 Ida., 779, 115 Pac. 979.

Our contention is that as to such corporations in cases like the present the remedy at law, namely, judgment followed by writ of mandamus is adequate and complete, and that, therefore, this court will not take jurisdiction in equity, in view of Section 723 of the Revised Statutes of the United States. That the remedy named exists is, of course, almost axiomatic

at this date, as it has been repeatedly used, both in cases where the directors or other municipal officers were asked merely to pay over funds previously collected and in cases where no fund had been provided and the relief asked was the enforcement of the levy, collection and payment over of the tax. Among the latter class of cases are the following:

Shepard vs. Tulare Irrigation District, 94 Fed. 1; affirmed 185 U. S. 1, 46 L. Ed., 773.

Thompson v. Perris Irrigation Dist. (C. C. S. D. Cal.) 116 Fed. 769; affirmed C. C. A. 9th Cir. 122 Fed. 860.

Mather v. City and County of San Francisco (C. C. A. 9th Cir) 115 Fed 37.

Herring v. Modesto, 95 Fed. 705.

The same rule obtains in those cases, where the fund has been raised and nothing remains but payment over. City of Santa Cruze vs. Wait, (C. C. A. 9th Cir.) 98 Fed. 387-393; S. C. below, 89 Fed. 619.

The question remains as to whether the remedy is of such a character as to bar the equitable jurisdiction. We think the authorities abundantly sustain our contention that it is. The following cases have held that a court of equity had no jurisdiction to compel the proper officers of a municipality to levy taxes for the satisfaction of a judgment previously had at law on bonds or interest coupons of the municipality, but that, on the contrary, the writ of mandate was the proper remedy.

Commissioners of Knox County v. Aspenwall, 24 Howard, 376, 16 L. Ed. 735.

Walkley v. City of Muscatine, 6 Wall, 481,
18 L. Ed. 930.

Rees vs. Watertown, 19 Wall, 107, 22 L.
Ed. 72 (last two paragraphs).

Marra vs. San Jacinto & P. V. Irr. Dist.,
131 Fed. 780, (Last Par. pp. 789-791).

Neither has the equity court jurisdiction to compel the levy or collection of the tax by the proper officers, where no judgment has been previously had at law.

Washington County v. Williams, (C. C. A.
8th Cir.) 111 Fed. 801, (at pp. 811-812).

Heine v. Board of Levee Comm., 19 Wall.
655, 22 L. Ed. 223.

In the last case cited the Supreme Court sustained a judgment dismissing a bill in equity, which alleged that the plaintiff was the holder of certain bonds issued by the defendant, Levee District, which, (like an irrigation district under our law) was a quasi municipal corporation, with authority to issue bonds and provide for their payment by tax levy on the property in the district; further that the commissioners had failed to make the levy and had resigned their offices for the purpose of avoiding the duty. The relief prayed was that the commissioners be required to make the levy. No attempt had been made to recover a judgment or to collect at law. The Supreme Court says:

“The question thus presented by the present case is not a new one in this court. It has been decided in numerous cases, founded on the refusal

to pay corporation bonds, that the appropriate proceeding was to sue at law and by a judgment of the court establish the validity of the claim and the amount due, and by the return of an ordinary execution ascertain that no property of the corporation could be found liable to such execution and sufficient to satisfy the judgment. Then, if the corporation had authority to levy and collect taxes for the payment of that debt, a mandamus would issue to compel them to raise by taxation the amount necessary to satisfy the debt."

And, again:

"There does not appear to be any authority founded on the recognized principles of a court of equity on which this bill can be sustained. If sustained at all it must be on the very broad ground that because the plaintiff finds himself unable to collect his debt by proceedings at law, it is the duty of a court of equity to devise some mode by which it can be done. It is, however, the experience of every day and of all men, that debts are created which are never paid, though the creditor has exhausted all the resources of the law. It is a misfortune which, in the imperfection of human nature, often admits of no redress. The holder of a corporation bond must be common with other men, submit to this calamity, when the law affords no relief."

The same rule obtains where the levy and assess-

ment has been made and nothing remains but collecting and paying over. This was ruled in *Goelet, et al., vs. Elizabeth*, 10 Fed. Cases, 526, Case No. 5502, and *Thompson vs. Allen County*, 115 U. S. 550, 6 U. S. S. C. Rep., 140, 29 L. Ed. 472.

In the *Goelet* case the facts were very similar to the present case. A bill was exhibited on the equity side of the court against the City of Elizabeth and its officers, alleging that the plaintiff was the holder of a judgment on certain of the city's bonds; that the city was insolvent and its officers had been and were collecting and diverting its revenues to purposes other than the satisfaction of plaintiff's judgment; that execution had been issued and returned unsatisfied. The Court says, on page 527:

"The difficulty with complainants' case, as it appears to us, is, that they have no standing in a court of equity. The 723d section of the Revised Statutes of the United States provides that 'suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law.' It may be true that the complainants have not 'a plain, adequate and complete remedy at law' for all that they ask for, but we think they have for all that they are entitled to. Conceding for the present that they are judgment creditors of an insolvent municipal corporation, and that they have failed to realize upon their execution the amount of their claim, yet their remedy at law is not exhausted. By a

long line of decisions of the supreme court, beginning with *Knox v. Aspenwall*, 24 How. (65 U. S.) 376, and ending with the recent case of *U. S. v. New Orleans*, 98 U. S. 381, it has been held that under the constitution and law of the United States, and especially by the provisions of the 14th section of the judiciary act (1 Stat. 81), the federal courts may issue the writ of mandamus to compel the proper authorities of municipal corporations to levy a tax for the payment of their debts, when no other means have been provided to meet their obligations."

The Thompson case was an appeal from a decree of a Circuit Court in Kentucky dismissing a bill in equity for want of jurisdiction. The showing was that the plaintiff had received judgment on bonds of the defendant county and execution had returned unsatisfied. The proper tax for payment had been compelled by a writ of mandamus, but no collector could be found to collect the taxes. After citing and reviewing many of the foregoing cases, the court say:

"We apprehend that there is some confusion in the plaintiff's proposition, upon which the present jurisdiction is claimed. It is conceded, and the authorities are too abundant to admit a question, that there is no chancery jurisdiction where there is no adequate remedy at law. The writ of mandamus is, no doubt, the regular remedy in a case like the present, and ordinarily it

is adequate and its results satisfactory. The plaintiff alleges, however, in the present case, that he has issued such a writ on three different occasions; that by means of the aid afforded by the legislature, and by the devices and contrivances set forth in the bill, the writs have been fruitless; that, in fact, they afford him no remedy. The remedy is in law and in theory adequate. The difficulty is in its execution only. The want of a remedy, and the inability to obtain the fruits of a remedy, are quite distinct, and yet they are confounded in the present proceeding. To illustrate: the writ of *habere facias possessionem* is the established remedy to obtain the fruits of a judgment for the plaintiff in ejectment. It is a full, adequate, and complete remedy. Not many years since there existed in Central New York confederations of settlers and tenants disguised as Indians, and calling themselves such, who resisted the execution of this process in their counties, and so effectually that for some years no landlord could obtain possession of the land. There was a perfect remedy at law, but through fraud, violence, or crime its execution was prevented. It will hardly be argued that this state of things gave authority to invoke the extraordinary aid of a court of chancery. The enforcement of the legal remedy was temporarily suspended by means of an illegal violence, but the remedy remained as before. It was the case of a miniature revolution. The courts of law lost

no power, the court of chancery gained none. The present case stands upon the same principle. The legal remedy is inadequate and complete, and time and the law must perfect its execution."

* * * * *

"A court of law possesses no power to levy taxes. Its power to compel officers who are lawfully appointed for that purpose, in a case where the duty to do so is clear, and is strictly ministerial, rests upon a ground very different from and much narrower than that under which a court of chancery would act in appointing its own officer either to assess or collect such a tax. In the one case the officers exist, the duty is plain, the plaintiff has a legal right to have these officers perform this duty for his benefit, and the remedy to compel this performance, namely, the writ of mandamus, has been a well known process in the lands of the courts of common law for ages."

* * * * *

"If the common law court can compel the *assessment* of a tax, it is quite as competent to enforce its *collection* as a court of chancery. Having jurisdiction to compel the assessment, there is no reason why it should stop short, if any further judicial power exists under the law, and turn the case over to a court of equity."

When the sole duty left for performance by the officers of the municipal corporation is the payment over of a fund already raised, the remedy at law is

the more clearly apparent and adequate. Such was the situation in *Hausmeister v. Porter*, 21 Fed. 355 (C. C. D. Cal.), a case thought to be directly in point in law and fact, and in which Sawyer, J. dismissed the bill for want of jurisdiction, on the ground urged by appellees here. The bill was brought by the holder of the bonds of Sacramento City, alleging that there was a large amount of money in the city treasury, that it was the duty of the treasurer to set aside a certain per cent thereof as a separate fund for the payment of his bonds and apply the same thereto; that the treasurer had refused so to do and was unlawfully diverting the money to other purposes. An injunction against using the money for any other purpose was asked, as in this case. After citing Section 723 Revised Statutes of the United States, the court says, on page 356:

“In this case, if, as alleged, there are funds in the treasury applicable to the purpose, it appears to me that the complainant has a plain, adequate, and complete remedy at law, by mandamus, for the non-payment of any lawful coupons held by him now due. Also, a complete remedy at law, by mandamus, if any remedy he has at this time, to compel defendant to set apart any moneys in the treasury required by law to be set apart as a ‘sinking fund’ for the payment when they fall due of any bonds held by him not yet matured.”

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“From these cases it is clear that if there is money in the city treasury applicable to the pur-

pose,—and it is alleged that there is,—the treasurer can be readily compelled by mandamus to pay the amount due complainant on his coupons; and if the officers do not provide the funds by levying the proper tax, that they can be compelled to do so by mandamus. This is a remedy at law direct, speedy and adequate, and, as was stated in the last case cited, the only remedy, in view of the provisions of the statute under which the bonds were issued and accepted. The decree asked for in this bill would afford no relief whatever without other and independent proceedings at law. It would simply keep the money in the treasury. No decree for the payment of the money could be made, because a judgment against the city, at law, would be ample for that purpose where a judgment could be had, and no such decree is asked.”

II.

Unless, then, there is something in the case made in the bill to distinguish it from the ordinary action for the enforcement of the statutory duty incumbent upon the municipal officers, as to the levy, collection and payment over of the tax for the satisfaction of the interest coupons, it would seem that the question of jurisdiction was not even open to argument. Appellant attempts such distinction, and, as we understand his brief, purports to find three grounds upon which the equitable jurisdiction may be based:

1st. That the district stands in the relation of a

trustee toward the bondholders and that equity will take cognizance in all matters involving a trust.

2nd. The familiar ground of avoidance of multiplicity of suits; and

3rd. That equity will take jurisdiction to quiet title to, or remove cloud from title of personal property as well as real, and that as a holder of the bonds he is entitled to such relief on the case made in the bill.

From this he goes on to the conclusion that the equity court, having jurisdiction for one purpose, will retain it for all purposes, thus drawing the whole of the controversy to the equity side of the court. To our minds the propositions, as well as the deduction, are unsound as applied to the facts of this case. But it seems unnecessary to go further than to show that on the case made by the bill, none of the alleged grounds of jurisdiction exist. We, therefore, take them up in the order named, proceeding first to the question of the existence, and, if existent, the effect of the district's trusteeship. Our contention is that neither the district or the board are trustees for the bondholders; and, further, that, if the existence of such trusteeship was admitted, this case would not be brought within equitable cognizance thereby.

As to the first proposition, namely, that the appellees are statutory trustees for the bondholders, appellant collects, on page nine of his brief, a number of authorities which it is claimed sustain that proposition. This we think is unfounded.

The statutes of Idaho, with reference to the payment of the bonds and interest, are printed in full on pages 37, 38 and 39 of appellant's brief. It will be noticed by the provisions of Section 2405, that the bonds and interest are to be paid by revenue derived from an annual assessment on *all* the lands of district. And by the provisions of Section 2410, the directors are required to levy an assessment annually, sufficient to raise the annual interest, and at the expiration of ten years after the issuance of the bonds, to increase the annual assessment to raise a sum sufficient to pay the principal as it matures. Further, that the assessment shall be paid into the treasury and constitute a special fund to be called the bond fund. It is in no place expressly provided that money can not be transferred from the bond fund into other funds, if the board thinks it advisable; nor that the bonds do not constitute a *general* obligation of the district. Direction is given as to providing a special fund for payment of bonds and interest but payment is not limited to that fund. True, no other means is provided therefor, but that we submit is purely a matter of the method of raising funds as between the district and the land holders and does not vary the character of the obligation as between the bond holders and the district. In short, as between the latter, the bonds are general obligations, and the fact that no means was provided for payment other than the special assessment would not vary their character as such. (United States v. Fort Scott, 99 U. S., 152; Fort Madison v. Fort

Madison Water Co., 114 Fed. 292). Being the general obligations of the district, the relation of debtor and creditor exists, rather than that of trustee and beneficiary. This point alone clearly distinguishes the cases hereinbefore referred to as cited by appellant on this point. With possibly one exception, every one of them involved special improvement bonds, that is bonds issued by a city or municipal corporation in payment for, or to raise money for, improvements in special and limited localities, within the boundaries of the municipality and to be paid by special assessment levied on the property benefited. As is expressly stated in the opinions, the bonds were so limited by the statutes or ordinances under which they were issued that they did not constitute a general, or any, pecuniary obligation of the municipality which was obligated only to take the steps provided to raise the fund for payment.

But even in the cases of the character cited by appellant, the trust, if any exists, is certainly not express. At most it was merely an implied trust, possibly only constructive. We do not, of course, dispute appellant's proposition, that equity has jurisdiction of trusts, and that such jurisdiction *may* be exercised even in a case where the legal remedy is adequate; in short, where the jurisdiction is concurrent. But we do contend that it is quite another thing to say that equity will imply a trust or impress a constructive trust for the purpose of taking jurisdiction where the jurisdiction is concurrent. Assuming, for the purpose of argument only, that, on the

facts shown a trust exists, and laying aside the question of multiplicity of suits, and the other matters shown in the bill, on which it is contended that the remedy at law is inadequate, all of which are discussed hereafter, certainly it will have to be admitted that the appellant has a concurrent remedy at law, by judgment and mandamus. In such case, we contend that, although the equitable jurisdiction *exists*, it will not be exercised, and this is especially true in the federal courts. Stated differently, where the existence of a concurrent jurisdiction is recognized, whether it will be exercised or declined rests largely in the discretion of the court, conditions as to the adequacy of the legal remedy controlling the exercise of such discretion. This is well illustrated in *Phoenix Mutual Life Ins. Co. v. Bailey*, 13 Wall. 616, 20 L. Ed., 501, cited by appellant, was an appeal from a judgment dismissing a bill in equity, on the ground that the remedy at law was complete and adequate. It was contended that the court had jurisdiction to compel an agreement to be delivered up to be cancelled, as it had been obtained through false and fraudulent misrepresentations. The court says that fraudulent misrepresentations and the fraudulent suppression of material facts are the principal grounds for the relief prayed, and was of the opinion that the facts were established. The jurisdiction of equity, is, of course, as well established in cases of this kind as in matters involving trusts, but the dismissal was nevertheless sustained, the court saying:

“Courts of equity, unquestionably, have jurisdiction of fraud, misrepresentation and fraudulent suppression of material facts in matters of contract, but where the cause of action is ‘a purely legal demand,’ and nothing appears to show that the defense at law may not be as perfect and complete as in equity, a suit in equity will not be sustained in a Federal Court, as it is clear that the case, under such circumstances is controlled by the 16th section of the Judiciary Act.”

The fundamental error, in our opinion, in appellant's brief on this point is the failure to distinguish between the existence of jurisdiction and the question of discretion as to exercise thereof. If it should be found that features of such character exist in this case that the equity court has jurisdiction, we still say that, nevertheless, the court, as a matter of discretion, will decline to exercise it, for the remedy at law is adequate. As was said by the court below (p. 38 Trans.), the court will not, “in advance of any general need therefor, draw to itself the whole of a controversy, the principal if not the only substantive issue in which may without difficulty or delay be tried out in an action at law, that would be to treat too lightly the fundamental right of a jury trial.”

A similar rule is stated by Wallace J., in *White v. Boyce*, (CC. N. Y.), 21 Fed. 228-232:

“While courts of equity have concurrent jurisdiction in all cases of fraud, they will not ordinarily exercise it, if there is a full and adequate

remedy at law (Bish. Eqt. Par. 20), *Ambler v. Choteau*, 107 U. S. 586; S. C. 1 Sup. Ct. Rep. 556), and the federal courts are especially admonished not to entertain such cases. The statutory enactment (section 16 of the Judiciary Act, Rev. Stat. par. 723), if only declaratory of the pre-existing law, is at least intended to emphasize the rule and impress it upon the attention of the court. *New York Co. v. Memphis Water Co.*, 107 U. S. 205; S. C. 2 Sup. Ct. Rep. 279. It is the duty of the court to enforce this rule *sua sponte*. *Oelrichs v. Spain*, 15 Wall. 211; *Sullivan v. Portland R. Co.*, 94 U. S. 806. It would therefore not be proper to assume to determine the question of fact whether any misrepresentations were made to complainant by defendant.

“Jurisdiction properly assumed, upon one aspect of the controversy, would authorize the court to proceed to a decree which would do full justice in the case upon all its branches. But unfounded claims of a character cognizable in equity cannot be made the basis of relief respecting other controversies between the parties which are cognizable only at common law.”

The cases cited by appellant to this point are distinguishable along the same line. In every one of them it was held that there was no adequate remedy at law, owing to the peculiar facts set forth or the peculiar law of the state where they arose. The court then proceeded to exercise jurisdiction on the ground of trusteeship. No one of them is authority for the

proposition that jurisdiction would have been exercised, even though a trust existed, had there been a remedy at law.

In conclusion on this point, it should be noticed, concerning the cases cited by appellant, that, with the exception of two, all of them are from the same district (Iowa) and that the other two (from Wisconsin) are founded on the Iowa cases, and, if in point at all, are contrary to the rule laid down by the Supreme Court of the United States as illustrated in cases hereinbefore cited. Furthermore, in all of them past diversions of funds were alleged and an accounting asked and shown to be necessary. In this case no past diversion is alleged, or is any adequate allegation made that there is danger of any diversion in the future.

III.

As to the argument that equity will take jurisdiction to prevent multiplicity of suits, there are several replies, the most obvious of which is that such jurisdiction will not be taken if there is no showing in the bill that such multiplicity of suits will be prevented, or, differently stated, unless there is an affirmative showing in the bill that the action of the equity court will be more efficacious in limiting the number of suits than would a judgment of the law court. There is an utter lack of any such showing in this bill.

As will be observed, there seems to be three classes of suits of which the appellant is apprehensive,

namely, tax-payers suits against the district, suits on similar bonds by other bond holders, and future suits on subsequently maturing coupons held by him. As to the first two classes, certainly a law action will be as effective as any disposition of the matter in equity. Those who would be parties to such suits are not parties to this suit, and can therefore be affected by no decree that could be made herein. A decree herein will be of avail in such suits only so far as the same operates as a precedent, which is equally true of a judgment in a law action.

Furthermore, as is said by the Supreme Court in *Equitable Life Assurance Society v. Brown*, 213 U. S. 25, 53 L. Ed. 682:

“It does not rest with the complainant to urge as a foundation for his suit, that the defendant may be thereby saved a multiplicity of suits by other parties, where the defendant raises no objection to such possible suits and urges no grounds for jurisdiction in equity of the complainant’s suit.”

See also *Thomas v. Council Bluffs Canning Co.* (C. C. A. 8th Cir.) 92 Fed. 422-423:

“The multiplicity of suits which confers jurisdiction in equity is a multiplicity of suits to which the complainant will be a party.”

As to the third class of suits, namely, those to be brought by complainant in the future, we submit there is no allegation in the bill upon which the conclusion that such suits are imminent can be reason-

ably founded, much less anything upon which it could be concluded that equity could afford any relief in this action which would in anywise limit their number. The only showing in this connection is made in the part of the complaint appearing on pages 17, 18, 19 and 25 of the Transcript. On page 17 it is alleged, *on information and belief*, that default will be made in subsequently maturing coupons. No fact is alleged upon which the court may judge as to whether or not the plaintiff is correct and no threat alleged. On page 19, the complaint says that unless restrained, he believes, defendant will institute and encourage actions attacking the bonds. On page 25 he says numerous suits will be instituted. We submit the allegations are insufficient, and, as is said by the court below, on page 36, "The probability of a multiplicity of suits is also asserted, but such danger does not appear to be imminent. There is no reason for concluding that, if in an action at law upon the coupons the court holds that the plaintiff is the rightful owner of the bonds, the district will in the future decline to meet its payments as and when they fall due."

Something is said in the brief as to the apportionment of the fund, but it is certainly apparent that no apportionment can be had in the absence of other bondholders as parties.

IV.

There remains the argument that equity will take jurisdiction to remove a cloud from the title to per-

sonal property, i. e., appellant's bonds. It is to be noticed that the first of the bonds do not mature until eleven years from the date of their issuance. Sec. 2397, I. R. C. (p. 37 Appellant's brief), that they were not authorized until December 6, 1910 (p. 4 Trans.), and hence the first of them cannot mature before December, 1921. Further, that no action is required by law of the board of directors or the district concerning the bonds until the expiration of ten years after their issuance thereof, at which time the directors must levy a sufficient sum to pay the principal as it matures. Sec. 2410, Idaho Revised Codes (p. 39 App. brief). This, at the earliest, would be in December, 1920.

The bonds are, of course, an entirely different and distinct matter from the matured coupons, upon which this action is primarily based, and the bill affirmatively shows that every act required of the board to date, in connection with both bonds and coupons, save and except the actual payment over of the money on the matured coupons, has been performed. The relief asked in this connection is that the defendants be restrained from doing anything which will in any way depreciate the value of the bonds, and that it be adjudged and decreed that all the bonds are legal and valid obligations of the district, and that they must be paid according to their tenor (pp. 20-21 Trans.). The allegations upon which this relief is asked, as heretofore noticed, are almost entirely made on information or belief and consist largely of appellant's conclusions. No threat, or any

other fact is alleged, on which the court might draw its own conclusions as to the necessity of such relief, and, as was said by the court below (Trans. p. 37), no reason is shown upon which it could be presumed that the judgment at law would not be "quite as effective in quieting such agitation and establishing the value of the bonds as a decree of a court of equity."

As authority for this proposition, appellant cites cases from the state courts, of which the case of *Sherman v. Fitch*, 98 Mass. 59, is a fair example. As clearly appears, even in that portion of the opinion quoted on page 29 of the brief, the suit was one for the *cancellation of outstanding instruments* which constituted a cloud on the title of the personal property. The other cases cited are similar. Needless to say no such proposition is involved here. If there is anything in the bill even resembling a cloud, it is the alleged statements of the defendants concerning the bonds, which oral statements, as this court well knows are not such matters as will be recognized in equity as a cloud on title.

Nor, on the other hand, have we been able to find any case wherein the validity of a contract as between the parties thereto has been established, far in advance of a breach, under the guise of removing cloud from title to personal property more especially where the contract is nothing more or less than the contract for the payment of money, as to which equity has always refused to decree specific perform-

ance, even when a breach was actually at hand or previously committed.

Respectfully submitted,

J. M. THOMPSON,

Residing at Caldwell, Idaho,

FREMONT WOOD and

DEAN DRISCOLL,

Residing at Boise, Idaho,

Solicitors for Appellees.

